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Supreme Court, U.S.
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No. 00-000

IN THE

Supreme Court of the United States

JOSE BATTLE, JUNIOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOEL KAPLAN, ESQ.*
100 N. Biscayne Blvd.
Suite 607
Miami, Florida 33132
(305) 374-2111
**Counsel of Record*

LISA COLÓN, ESQ.
100 N. Biscayne Blvd.
Suite 607
Miami, Florida 33132
(305) 374-2112

[September 8, 2009]

QUESTION PRESENTED

Whether a conspirator who has communicated to his co-conspirators his disavowal of their multi-objective, money-generating RICO conspiracy, defeats his withdrawal because his subsequent concealment of the existence and source of his ill-gotten gains also had the unintended effect of concealing the existence of the conspiracy that continued on without him?

PARTIES TO THE PROCEEDING

Jose Battle, Junior was the appellant below and is the petitioner in this Court. He will be referred to in this Petition as "Battle Junior." The appellee below and respondent here is the United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 313 Fed.Appx. 283, under the name *United States v. Acuna*, and is reprinted at Appendix A. The District Court's opinion is reported at 473 F.Supp. 2d 1185 and is reprinted at Appendix B.

JURISDICTION

The Court of Appeals entered its order denying a petition for rehearing on June 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves Title 18 U.S.C.A. § 1962 which reads in full as follows:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of

controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

JOSE BATTLE, JR. and others, including his father, Jose Battle, Sr. were indicted for RICO conspiracy in violation of 18 U.S.C. §1963(d). DE1255.[1] The Indictment alleged that "[f]rom in or about 1964, through the date of [its] return," March 16, 2004[2], Battle Junior and the others conspired to participate in the affairs of a criminal enterprise known as the "Corporation" through a pattern of racketeering activity and through the collection of unlawful debt. DE1255-8. The Indictment charged that the objectives and purposes of the Corporation included, but were not limited to, enriching its members through money laundering and the operation of illegal gambling businesses, DE1255-5, and preserving its operations and profits through the use of violence and destruction, including but not limited to, acts of murder, arson and assault. DE1255-6.

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[1]All citations to the district court record are referenced using the number of the docket entry, "DE," and page number.

[2]As the Eleventh Circuit pointed out, "[t]here is a 5 year statute of limitations for a RICO violation. 18 U.S.C. § 3282; *United States v. Pepe*, 747 F.2d 632, 664 (11th Cir.1984). The defendants were indicted on March 16, 2004, therefore, they must have participated in the RICO conspiracy until at least March 17, 1999 in order for their prosecutions to be timely." *United States v. Acuna*, 313 Fed.Appx. 283, 292 (11th Cir. 2009).

Prior to trial the district court ordered the government to provide each defendant a bill of particulars that specified...

> if he or she is charged under the RICO conspiracy with the First Prong [Defendant had specific intent to personally participate in the commission of "two predicate offenses"], or the Second Prong [Defendant had specific intent to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate acts" as part of a "pattern of racketeering activity"] or with both prongs. DE571.

The government responded that it "charge[d] [Junior] under the first prong...that is the United States charge[d] that [Junior] had the specific intent to personally participate in the commission of two or more predicate acts." DE766. The response listed 64 predicate acts Battle Junior "had specific intent to personally participate in the commission of." Thirteen involved gambling activities that were allegedly committed over a span of years that ended in 2004. Eleven involved murders or conspiracies to commit murder. Seventeen related to arsons and the deaths the arsons caused.[3] Nine predicates alleged

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[3]By the close of the government's case-in-chief, Battle Junior had been exonerated of all acts of violence alleged against him. Some the government "dropped," DE1957-93, "removed," DE2082-101-3, or conceded Battle Junior was not liable for. DE2274-11-12. After the government rested, the district court entered an Order granting in part and denying in part Battle Junior's motion for judgment of acquittal. *United States v. Jose Battle, Jr., et. al.*, 473 F.Supp.2d 1185 (S.D. Fla.

Travel Act violations. Three alleged thefts from interstate shipments. DE766.

Eleven involved money laundering. Seven acts alleged unspecified transactions through an identified corporation over a specified period of years:

Union Financial Research	1980-1985
Voltaire Trading	1980-1986
Aztec Financial Enterprises	1984-mid-1990s
YMR Fashions	1988-1992
Arnold's Stores	1988-1995
Stanara Company, Corp.	1988-2001
Biscayne Coast Investments	1995-2001

2006). The court granted the motion as to the predicate acts involving violence, finding "the evidence is insufficient to establish that [Junior] specifically agreed to participate in the multiple acts of arson, the murders associated with the arsons, or the murder of Omar Broche." 473 F.Supp.2d at 1212. In footnote 22, the court further ruled that...

> [a]s to remaining predicate acts involving Jose "Palulo" Enriquez, and the charged arsons and resulting murders, I conclude after careful consideration of the Government's arguments...that, even with all inferences in its favor, it has failed to establish that Battle, Jr. agreed to personally participate in these predicate acts...[And e]ven if the Government had argued a "Second Prong" theory of liability consistent with that definition, I would still conclude it has failed to sufficient[ly] prove its case against Battle, Jr. [for Rule 29 purposes] with regard to the arsons and murders. 473 F.Supp.2d at 1213 fn. 22.

The others charged the interstate or foreign transportation of money, including the transportation of cash to Peru.

According to government witness Abraham Rydz, in the early 1980s, he merged his New York "bolita" gambling business with Battle Junior and Senior's New York "bolita" gambling business. DE1947-92.[4] Battle Senior, Battle Junior, and Rydz each owned an equal percentage of the business which was referred to as the "Corporation." DE1947-97-8. Others, including Manuel Marquez, owned lesser percentages. DE1947-98. Whenever the business generated more cash than it needed to fund operations, the partners received a distribution of the profits, called "cuts," based upon the percentage each owned. DE1947-111-12.

In 1981 Corporation members' profits were carried in cash from New York to Panama. DE1966-37; 46. This money then was returned to the United States in the form of loans from foreign corporations to a mortgage company, Union Financial Research ("UFR"), located in Miami, Florida. DE1947-127;130. In 1982 Rydz and Battle Junior moved to Florida. DE1947-114-5. They maintained control over the bolita business, while Battle Junior oversaw UFR's day-to-day operations.

On April 8, 1983, Rydz and Battle Junior flew to New York to pick up their "cuts." DE1947-140.

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[4]In bolita the bettor picks one, two or three number(s); he wins if his number "comes out." DE1947-102.

Manuel Marquez gave them the money which the police seized at JFK airport. DE1947-142-3. The ensuing publicity caused the bank that had lent UFR money to use in making loans, to terminate the relationship. Ultimately, UFR went out of business. DE1947-145; DE1957-98. Each Corporation member's profit from the UFR venture was transferred to his own personal offshore account.

According to government witness Vidan, who had been Battle Junior and Rydz' bookkeeper, two companies, Voltaire Trading Investments and Aztec Financial Enterprises, were created in the early 1980s to buy property for individual Corporation members. Voltaire was initially created to buy a lot in Key Biscayne, Florida, for Battle Senior. DE2209-66. The land was purchased in 1982, but by 1984 Battle Junior had taken possession of the property. He constructed a home on it in which his mother, who was estranged from his father, lived until it was sold in 2001.[5] DE2213-24. Although the home remained titled to Voltaire until its sale, Vidan testified the home (and Voltaire) were owned by Battle Junior. Battle Senior never lived at the home. He lived at a property he called "El Zapotal" located miles away from Key Biscayne. DE2200-38-39.[6]

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[5]Voltaire held a mortgage on the home for the buyer which was later assigned to Key Financial Estates, a Florida corporation whose president and sole shareholder was Battle Junior. These transactions were not alleged as predicate acts.

[6]In 1999 Senior gave "El Zapotal" in equal parts to Junior, Junior's wife, and Junior's three children. Senior filed an IRS Form 709, "United States Gift (and Generation-Skipping Transfer) Tax Return," to report this gift. This Form 709 was

Aztec purchased two adjacent lots (that became 730 Mashta Drive and 740 Mashta Drive) in Key Biscayne, Florida in 1984. DE2213-79-80. Rydz bought one and Manuel Marquez bought the other. DE2213-82. Sometime in the early 1980s Battle Junior acquired Marquez' lot. DE2213-82. Vidan provided no additional details about this transfer. DE2213-91-91.

On November 30, 1988, Rydz and Battle Junior announced to their co-conspirators that they were leaving the "Corporation." DE1966-22. Their decision reflected their desire to "disconnect" themselves from the Corporation's business and the people who worked for it. DE1966-58-59. According to government witness, and former co-conspirator, Perez, he saw Battle Senior, Battle Junior, Rydz and other Corporation members at a funeral on November 30, 1988. DE2047-133-134. Perez witnessed Rydz show Willie Pozo (a top tier Corporation member) a calendar with the date circled on it and then tell Pozo "This is the day I'm leaving. Have my totals ready." DE2047-135. Perez heard Rydz tell Pozo that Battle Junior was leaving as well. DE2047-135. And, Perez recalled Battle Junior saying he too was leaving on the circled date. DE2073-91-2. Later, Pozo told Perez that Rydz and Battle Junior were no longer owners. DE2047-136; DE2073-93. After the funeral, the ownership percentages of the remaining conspirators changed. Pozo's percentage became 25%, Manuel Marquez became 25%, Battle Senior's became 30%, and José Guerrero's percentage became

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introduced as part of Defendant-Battle's Exhibit 92. DE2318-29-33. "El Zapotal was not listed as a predicate act.

15%. DE2073-71-2. Perez received the remaining 5%. DE2073-95-6.

Beginning in 1990 Rydz and Junior used money they had received before their 1988 withdrawal announcement to invest in retail and manufacturing clothing businesses. Each investment was funded by transferring money from their personal Swiss bank accounts through Stanara, a Florida Corporation established in 1990. The first investment was to YMR, a clothing manufacturer. DE1957-99-100. Arnold's Stores was part and parcel of this business deal. An investment in another clothing manufacturer, Trends, followed YMR. DE1957-133. Their investment in Biscayne Coast Investments came at the end of the Trends agreement. Biscayne Coast, the last of the investments in the clothing businesses ceased operation on November 20, 1998.

In all of their post-withdrawal investments using their gains from their days with the Corporation Rydz "was always partner[ed] with the same person. I had only one partner, Mr. Battle, Jr." DE1957-122. Vidan's testimony further established that the monies Rydz and Battle Junior were spending/investing were the profits their pre-November 1988 gambling activities had generated. DE2195-40-41.

In the early 1990s, while invested in YMR, Rydz and Battle Junior separately built homes on the land Aztec had acquired ten years previously. DE2213-24. To fund construction Vidan transferred money from each's Swiss accounts to Stanara N.V., which, in

turn, lent it to Aztec. DE2213-23. Vidan kept these monies separate, using different bank accounts, one named "Aztec 740" for Rydz' house and the other "Aztec 730" for Battle Junior's. DE2222-17. Construction was complete by 1995. DE2213-24. Each lived in the homes with their families until they were sold.

Meanwhile, sometime in the 1990s Corporation members began laundering their monies through the purchase of a casino in Peru. DE1958-23. Like the early 1980s purchase of UFR, cash generated by the Corporation's gambling operation in New York was physically carried to Peru to fund this venture. Rydz and Battle Junior had nothing to do with this casino. DE1956-104-05. The Peru casino venture marked the first money laundering effort since Battle Junior renounced his position in and share of profits from the Corporation. Interestingly, the district court ruled Battle Junior had no liability for the money laundering and travel act predicate acts arising out of the Peru casino venture. See, *infra*.

In its Order on Battle Junior's motion for acquittal, the district court ruled Battle Junior's gambling acts had ended in 1988, not 2004 as originally alleged, and it amended the Bill of Particulars to reflect this finding. 473 F.Supp.2d at 1214-15. As to the money laundering acts, the district court made two findings. First, it ruled Battle Junior's laundering of his ill-gotten gains after he withdrew from the Corporation, constituted predicate acts that were related to the enterprise.

> Battle, Jr., ...even after [he] ceased receiving profits from the Corporation, continued to further the goals of the enterprise by concealing the money and protecting it, and thereby protecting [himself], from detection from law enforcement agencies. 473 F.Supp.2d at 1202-3.

Accordingly, the commission of these predicate acts defeated Battle Junior's motion that the Indictment should be dismissed under the statute of limitations because it was not returned until 16 years after he withdrew from the conspiracy. 473 F.Supp.2d at 1206-7.

Second, the district court ruled that (a) Junior's announcement to his coconspirators he was disavowing the conspiracy, (b) his renouncement of his share of the Corporation's profits–which he also communicated to his coconspirators, (c) his non-involvement in Corporation money laundering activities (the Peruvian casino) and (d) his exclusive use of his own ill-gotten gains ("gotten" before his 1988 disavowal) in his money laundering activities that began in 1990 was not enough to establish a withdrawal. 473 F.Supp.2d at 1206.

Finally, the district court struck Corporation-related predicate acts that occurred after Battle Junior withdrew in 1988:

> 2) the Peru money laundering evidence...is not admissible against Defendant [Battle, Jr].... and (6) the predicate acts based on gambling activity may not be charged

> against . . .Battle, Jr. once [he] no longer received gambling profits. 473 F.Supp.2d at 1208.

Thus, the only predicate acts alleged against Battle Junior that post-dated 1988 and that were submitted for the jury's consideration were those that encompassed his spending/investing of his own pre-1988 ill-gotten gains.[7]

The district court instructed the jury on the defense of withdrawal/statute of limitations. DE2345-31-32. During its deliberations the jury asked the following question:

> After the withdrawal from the conspiracy, does the use of ill-gotten funds create a continuance of the conspiracy? DE2362.

The court refused to answer this question, DE2369-12, even though the law provides a clear and simple answer. *United States v. Adkinson*, 158 F.3d 1147, 1160 fn 23 (11th Cir. 1998)("The spending of ill-gotten gains does not constitute part of the scheme, even if the receipt of diverted funds may be some evidence that there was a scheme."). *See also*, *Krulewitch v. United States*, 336 U.S. 440 (1949); *Grunewald v. United States*, 353 U.S. 391 (1957).

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[7]According to the Eleventh Circuit, "[t]he vast majority of Battle, Jr.'s money laundering pre-dated the March 17, 1999 statute of limitations cut off." 313 Fed.Appx. at 293. As a result, the Eleventh Circuit turned its attention to two uncharged transactions involving the sale of Battle Junior's mother's home (2001) and the sale of his own home (2002) to show Battle Junior continued his participation in the RICO conspiracy into the statute of limitations period.

The jury found Junior guilty of RICO conspiracy. DE2384. The jury then returned its Special Verdict in which it found (a) the criminal enterprise generated $1.4 billion dollars[8] in proceeds from racketeering activity and (b) Junior had obtained directly or indirectly certain property from racketeering activity. DE2403. Although his advisory guideline range was 46 to 57 months, the district court departed upward and sentenced Battle Junior to 188 months imprisonment.

Battle Junior appealed his conviction and sentence to the Eleventh Circuit. That court affirmed, finding first that he had laundered money for then-active members of the conspiracy.[9] Second, the Eleventh Circuit found that even if he had not, Battle Junior's laundering of his own ill-gotten gains fulfilled one of the Corporation's objectives--to conceal its criminal activities from law enforcement. Accordingly, the Eleventh Circuit held Battle Junior had only ceased participating in one aspect of the conspiracy and the district court correctly denied his motion for acquittal.

> Even if the monies that were laundered were actually individual profits from the illegal bolita gambling of the Corporation, and no longer proceeds owned by the Corporation itself as an enterprise, as an

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[8]The district court reduced this verdict to $642 million finding Battle Junior should only be held accountable for "relevant conduct from 1979 through 1988" and not for "gambling profits after 1988." DE2665-2, fn 1.

[9]This finding is unsupported by the evidence. In fact, government witness Vidan's testimony contradicts it explicitly.

> associate and member of the Corporation Battle, Jr. facilitated and carried out the goals and objectives of the enterprise to conceal illegally obtained money through various money laundering ventures, and, in so doing, concealed, promoted, and protected the Corporation and its members and associates. In so doing, Battle, Jr. did not withdraw, he continued to carry out the goal and object of the Corporation, as alleged in the Superseding Indictment, to prevent the detection of its criminal activities by laundering the money. 313 Fed.Appx. at 295.

Battle Junior's petition for rehearing was denied on June 10, 2009.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate to decide whether a conspirator who has communicated to his co-conspirators his disavowal of their multi-objective, money-generating RICO conspiracy, defeats his withdrawal because his subsequent concealment of the existence and source of his ill-gotten gains also had the unintended effect of concealing the existence of the conspiracy that continued on without him?

A. The Eleventh Circuit's Opinion Conflicts with this Court's Precedents

While a RICO conspiracy differs in several respects from a "regular" conspiracy, the principles of conspiracy law pertain to a RICO conspiracy as well.

United States v. Elliot, 571 F. 2d 880, 902-3 (5th Cir. 1978). The agreement is the *actus reus* of the crime of conspiracy. *United States v. Shabani*, 115 S.Ct. 382 (1994). In a RICO conspiracy case, "[t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts." *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995). A conspiratorial agreement is presumed to last until its objective is accomplished or the agreement is abandoned; it does not exist *ad infinitum*. *United States v. Alred* 144 F.3d 1405, 1416 (11th Cir. 1998)("A conspiracy is an ongoing criminal activity for which a participant remains culpable until the conspiracy ends ***or*** the participant withdraws." (Emphasis added)). Where a defendant has withdrawn, the agreement has ended as to him even if the conspiracy continues on. *United States v. Salerno*, 868 F.2d 524, 534 fn 4 (2nd Cir. 1989)("...it is clear that even when a RICO conspiracy continues into the limitations period, an individual conspirator can commence the running of the statute of limitations as to him by affirmatively withdrawing from the conspiracy.").

This Court has rejected arguments that acts which conceal its commission automatically extend the life of the conspiracy. In *Krulewitch v. United States*, 336 U.S. 440 (1949), this Court concluded that "even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective." 336 U.S. at 442. While *Krulewitch* handed the government a clear defeat in its attempt

to expand a conspiracy *ad infinitum* on the theory every conspiracy entails an *implicit* agreement to cover-up the crime, this Court did not stop there.

In *Grunewald v. United States*, 353 U.S. 391 (1957), the defendants were convicted of conspiring to defraud the government in its administration of the tax code. The goal of the conspiracy was to obtain "no prosecution" rulings in favor of taxpayers under investigation. The conspirators paid the tax official who entered these rulings. After he did, the conspirators attempted to doctor a report about one of the cases, took steps to cover up the cash payments, induced individuals to not reveal the conspiracy to a grand jury, and made evidence disappear. The indictment *explicitly* charged that part of the conspiracy was an agreement to conceal the conspirators' acts.

This Court granted certiorari to consider the question, among others, whether the prosecution of the conspiracy charge was barred under the statute of limitations. In finding it was this Court held:

> We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.
>
> By no means does this mean that acts of concealment can never have significance in

> furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime...[H]ere, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended-a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord. 353 U.S. at 405-6.

Under *Grunewald*, Battle Junior 's agreement cannot be indefinitely lengthened because he took steps to "bury" his traces. The Eleventh Circuit previously acknowledged as much. *See*, *United States v. Adkinson*, 158 F.3d 1147, 1160-1 (11th Cir. 1998)("...For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases..."). Yet, it ruled that Battle Junior 's agreement could be extended, so as to defeat his withdrawal, because he took steps to "bury" his traces even though the case law "at first blush," 313 Fed.Appx. at 293, supported Battle Junior's position.

On second blush, the Eleventh Circuit limited *Krulewitch* and *Grunewald* to non-ongoing conspiracies. It reasoned that two transactions within the statute of limitations period (the 2001 sale of the home in which his mother resided (Voltaire) and the 2002 sale of his own home (Aztec))[10] showed he only ceased his participation in the Corporation's gambling business because burying his traces had the effect of concealing his participation in, and thus the existence of, the Corporation he left 13 years earlier. The notion that a conspirator would withdraw from the money-making portion of the conspiracy only, while agreeing to continue to fulfill a separate (non-money making) objective *for* his former co-conspirators, and thus continue his own liability, sinks this finding. So does his exoneration from any post-November 1988 crime with which other co-conspirators were charged–the Peru venture, the murder of Omar Broche, and the gambling.[11]

It is important for this Court to review this case because the Eleventh Circuit's decision precludes a conspirator from concealing his prior participation and withdrawing from an *ongoing* conspiracy.

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[10]Notably, neither of these transactions was charged in the Indictment, listed as a predicate act in the Bill of Particulars or submitted on the jury's verdict form.

[11]If Battle, Jr. had not effectively withdrawn from the money laundering side of the conspiracy, how could he have escaped liability for Peru? After all, is a member of a conspiracy not liable for the acts of his co-conspirators whether he personally committed those acts or not? *See, United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005)("...withdrawal precludes liability for acts occurring *after* the withdrawal.")

> The defendant cites United States Supreme Court case precedent [*Krulewitch* and *Grunewald*] in which the court found that concealment did not continue the conspiracy. However, these cases are distinguishable because the conspiracy had actually ended and the objectives of the conspiracy had been met prior to the concealment. 313 Fed.Appx. at 294.

The impact of this ruling, if affirmed, will be that the statute of limitations will never begin to run as to an individual who leaves a conspiracy that goes on without him as long as he takes steps to bury *his* traces of *his* prior criminal activity. This Court should grant this Petition to determine whether this Court's precedent, *Krulewitch* and *Grunewald*, permit this novel result.

B. The Eleventh Circuit's decision limits the defense of withdrawal from an ongoing RICO conspiracy (that has as one of its objectives concealment of the enterprise) to only a conspirator who divulges to law enforcement his involvement in the conspiracy.

Equally problematic, whether intended or not, is the impact of the Eleventh Circuit's decision on the elements of the defense of withdrawal. Heretofore, a conspirator could effectuate his withdrawal by, among other things, communicating his disavowal to his co-conspirators ***or*** to law enforcement. The former does not require that the conspirator cease concealing his prior involvement. The latter obviously does. Thus, under the Eleventh Circuit's

decision, the defense of withdrawal (from an ongoing conspiracy in which there is an explicit or implicit agreement to conceal its activities[12]) will be limited to a conspirator who divulges his prior involvement. This has never been the law.

The crime of conspiracy, and the defense of withdrawal from a conspiracy, are concerned with what the defendant *agreed to do* or *ceased agreeing to do*. *United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003); *See also*, *United States v. Shabani*, 513 U.S. 10, 16 (1994)("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act"). *See*, *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998)("crime of conspiracy is predominantly mental in composition."). The efficacy of a withdrawal from a conspiracy/statute of limitations defense has never turned on the question whether the conspiracy withdrawn from ended with the conspirator's withdrawal or continued on without the withdrawn conspirator. And, until the Eleventh Circuit's opinion in this case, the law did not demand that a conspirator reveal to the authorities his criminality to effectuate his withdrawal from a conspiracy that continues on without him. *United States v. Gypsum*, 438 U.S. 422, 464-5 (1978)("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.").

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[12]Every conspiracy has an agreement, be it explicit or implicit, to hide its existence. *See, e.g., Grunewald, supra.*

Rather, up until this case, a conspirator could withdraw from a conspiracy by revealing the conspiracy to the authorities ***or*** by announcing his disavowal to his co-conspirators. *United States v. Finestone*, 816 F.3d 583, 589 (11th Cir. 1987). However, the Eleventh Circuit changed the landscape when it determined Battle Junior's failure to disavow the concealment aspect of the conspiracy made his withdrawal insufficient. Because the only way to disavow the objective of concealment is to do its opposite, to reveal one's criminality, a conspirator in Battle Junior's position could not withdraw unless he revealed the source of his money and, concomitantly, the crimes that generated it to law enforcement.

The implications of the Eleventh Circuit's alteration of the defense of withdrawal as to an ongoing conspiracy are far-reaching. Conspiracies pose a "threat to the public" with decreased "probability that the individuals involved will depart from their path of criminality." *United States v. Jimenez-Recio*, 537 U.S. at 275. Withdrawal from a conspiracy is something the law should encourage. If the price of doing so is to implicate oneself in the very criminal activity he seeks to disavow, then there will be little to no incentive to cease voluntarily from the activity.

In addition, considering the nature of a RICO conspiracy (a large-scale, long running criminal enterprise that endeavors to remain concealed), the Eleventh Circuit's decision will all but prevent the statute of limitations from ever expiring in such

cases.[13] The policies underlying the statute of limitations are not unimportant in the administration of justice.

> [T]the applicable statute of limitations... is...the primary guarantee against bringing overly stale criminal charges.' Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.' *Public Schools v. Walker*, 9 Wall. 282, 288, 19 L.Ed. 576 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.FN14 As this Court observed in *Toussie v. United States*, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970):
>
> > 'The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is

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[13]The facts of this case demonstrate this point. The evidence showed the Corporation was an enterprise whose membership, goals, leadership, roles and activities never stayed the same. It continued making money and hiding its activities long-after its original participants were gone (incarcerated, deceased, withdrawn, "retired").

> designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.'

United States v. Marion, 404 U.S. 307, 322-323 (1971). Accordingly, this Court should review the Eleventh Circuit's opinion and decide whether the defense of withdrawal from a conspiracy is limited to those conspirators who confess their crimes to the authorities.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Joel Kaplan, Esq.*
100 N. Biscayne Blvd.
Suite 607
Miami, Florida 33132
(305) 374-2111

Lisa H. Colón, Esq.
100 N. Biscayne Blvd.
Suite 607
Miami, Florida 33132
(305) 374-2112

**Counsel of Record*

September 8, 2009

APPENDIX

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Julio ACUNA, a.k.a. Chino, Jose Miguel Battle, Jr., a.k.a. Miguelito, a.k.a. Jose R. Battle, a.k.a. Jose Miguel Battle Rodriguez, a.k.a. Jose Rodriguez Battle, a.k.a. Jose Rodriguez Batlle, a.k.a. Mike Battle, a.k.a. Mike Jr.,

Defendants-Appellants.

No. 07-10382.

Feb. 20, 2009.

*285 COHILL, District Judge:

**1 In this organized crime enterprise, co-defendants Jose Battle, Jr. ("Battle, Jr.") and Julio Acuna ("Acuna") appeal their convictions and sentences on various grounds. The appellants contend that the district court made numerous errors, including: (1) denial of Battle, Jr.'s motion to dismiss the indictment on the grounds that it was barred by the statute of limitations; (2) responding to a jury question as to Battle, Jr.'s defense of withdrawal from the conspiracy by directing the jury to review the instructions again and reformulate the question if it wished; (3) upwardly departing prior to imposing

sentence on Battle, Jr.; (4) imposing sentences on both defendants that were unreasonable in light of the factors enumerated in 18 U.S.C. § 3553(a); and (5) entering a forfeiture order as to Battle, Jr. that was grossly disproportionate to the offense.[1]

For the reasons set forth below, we will affirm both convictions and sentences.

I. PROCEDURAL BACKGROUND

On May 31, 2005, a federal grand jury indicted the defendants and others in a one-count superseding indictment charging them with Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy, specifically, a conspiracy to violate 18 U.S.C.1962(c) by unlawfully conducting and participating in the conduct of a criminal enterprise through a pattern of racketeering activity, and the collection of unlawful debt, all in violation of 18 U.S.C. § 1962(d). The superseding indictment charged Jose Battle, Sr. (Battle, Jr.'s father), Battle, Jr., and Acuna, among others, with engaging in illegal activities through a large-scale, international enterprise known at various times as the "Cuban Mafia" or the "Corporation" which operated in the United States, the Caribbean,

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[1] Having carefully reviewed the record, we reject without further discussion appellants' additional contentions concerning: (1) the admission of out of court testimony of two unavailable witnesses, Idalia Fernandez (deceased) and Carlos Hernandez (mentally ill); (2) the admission of evidence against Acuna regarding the murder of Ernesto Torres; (3) the admission of evidence of Battle, Jr.'s monetary transactions conducted from 2000 through 2002 involving Aztec, Voltaire and El Zapotal.

Europe, and Central and South America. The superseding indictment charged that: (i) the Corporation was an enterprise as defined by 18 U.S.C. § 1961(4), whose members functioned for the common purpose of achieving the illicit objectives of the Corporation, and (ii) the activities of the Corporation affected interstate and foreign commerce. The indictment further alleged that the Corporation was run by a Godfather (the Padrino), a Vice Chairman, and a Counselor (Consejero), and was operated by groups known as Divisions and Crews, each of which had Lieutenants, Soldiers and Operators. Criminal activities such as gambling, money laundering, and enforcement, were conducted within geographic areas. "Enforcers" of the Corporation enforced discipline, intimidation of competition and induced fear of physical and financial injury to members of the Corporation as well as outsiders.

Jury selection began on January 9, 2006, and after a trial lasting more than five months, the jury returned its verdict on July 20, 2006. Battle, Jr., Acuna and Manuel Isaac Marquez were found guilty of conspiracy to commit racketeering. The verdict specified their liability as to the predicate offenses charged. The court sentenced Acuna to a life term and entered a $1.4 billion money judgment against him. Battle, Jr. was sentenced to 188 months' ***286** incarceration and three years' supervised release and ordered forfeiture of various assets. The court also entered a RICO forfeiture judgment of $642 million as to Battle, Jr. representing gambling profits the enterprise had earned from 1979 through 1988. The defendants now appeal.

II. FACTS

A. THE ENTERPRISE STRUCTURE AND OPERATION

**2 We will describe the entire operation here in some detail, as this is necessary when considering the reasonableness of the sentences imposed by the district court.

1. Bolita

The Defendants were part of an organized crime enterprise (the Corporation) that ran "bolita," a numbers gambling operation in New York and New Jersey. The organization was devoted to making as much money as possible-especially for those at the top-through numerous bolita gambling locations. It also existed to protect that money by any means necessary. The indictment charges that the conspiracy began in 1964, and involved the commission of a variety of predicate acts, including murder, arson, and money-laundering. Jose Battle, Sr. was at various times the head of the Corporation and was the father and codefendant of Battle, Jr., who also played a leadership role for a certain period of time. Battle Sr. plead guilty, but he died after he was sentenced. Acuna was a long-time confederate of Battle, Sr., who acted as Battle Sr.'s bodyguard and worked as an "enforcer" for the organization.

In the beginning Abraham Rydz and fellow Cuban emigres, including Battle Sr., Juan Mojica, and Humberto Davila, operated separate bolita operations

in New York and New Jersey. Over time, Rydz became a partner of Mojica, who had moved to Spain, Antonio Rodriguez, who lived in Florida, and Luis Tinta. Rydz and Tinta managed 40 bolita "spots" (a location such as a business or store where a bolita worker took bets, also known as a "store" or "bank") that collected over a million dollars in bets per week. Davila's bolita operation, known as the "Company," rivaled Battle Sr.'s Corporation. The Corporation's enforcers would ensure compliance with the "two-block rule" (that a new spot could not be opened within two blocks of a competitor's existing spot) by first issuing a warning to business owners and workers; if unsuccessful, enforcers would then resort to such tactics as destruction of property, arson, assault, extortion, and murder.

In 1977, Battle Sr. and Acuna were tried for the murder of Ernesto Torres, a former Corporation employee. Torres had left the organization because of a dispute with Battle, Sr. over his own outside gambling activities, which Battle, Sr. believed were inconsistent with the interests of the organization. Torres also owed the organization bolita money that he had collected as a banker. After Torres kidnapped and killed one of the Corporation's bankers, Acuna and Battle, Sr. tracked Torres down in Florida, where he was living with his girlfriend Idalia Fernandez. Acting under the direct orders of Battle, Sr. Acuna entered the apartment, shot and wounded Fernandez while she watched television in the living room, and following a shootout with Torres, shot and killed him in the bedroom closet.

The deposition testimony of two witnesses from that murder trial, Carlos Hernandez and Idalia Fernandez, was read into the record in the instant case. Within *287 weeks of being deposed, Fernandez was shot to death in New York.

**3 Battle, Sr. plead guilty to conspiracy to murder Torres and the charges against Acuna were dismissed.[2] Upon release from prison in late 1979, Battle, Sr. began working with his son, who in a sense, had been "tutored" in the bolita business by Rydz at Battle, Sr.'s request. Manuel Marquez, Sr., his uncle, helped run the operations. Rydz asked Battle, Jr. if he could represent that they were partners so that Battle, Sr.'s reputation would afford Rydz's some protection. Battle, Jr. agreed. Rydz's partners wanted to retire, and Rydz, needing protection, agreed to merge his bolita operation into the Battles' smaller business. At that point, Rydz, Battle, Jr. and Battle Sr. each received 16% of the profits, and Marquez was paid a percentage of the business as a salary.

This combined organization operated in Queens, the Bronx, Brooklyn and in portions of Manhattan. Battle, Sr. confided to Rydz that he had gone to Miami in 1976 in order to get rid of Torres, and that

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[2] Specifically, Battle, Sr. was convicted on conspiracy and solicitation counts, but on appeal, the conspiracy charge was dismissed and the solicitation counts were reversed; he later pleaded guilty to conspiracy and was sentenced to 33 months' probation with credit for time served. Acuna had absconded after the 1977 Torres murder charge; he was arrested in 1984.

he would also like to get rid of Fernandez, who had been with Torres when he was murdered. Battle, Sr. later told Rydz that Fernandez had to be disappeared" because she had witnessed Torres' murder and had testified against Battle Sr. in his murder trial. (Fernandez had testified that on June 16, 1976, after she and Torres fled to Florida, that Acuna broke into their Hialeah, Florida apartment, shot her in the face and chest, and, when she awoke, she discovered Torres had been killed.)

Rydz and Battle, Jr., now allies, moved to Miami in 1982, and Battle Sr. likewise relocated there. Battle, Sr. set up a 20-acre farm called "El Zapotal." While Marquez managed bolita operations on a day-to-day basis, Rydz and Battle, Jr. called Marquez and others in New York on a daily basis, checking on operations and managing the business. Rydz and Battle, Jr. traveled to New York at least twice a month to review gambling records and reports, claim their percentage of profits in cash, and make management decisions. Employees of the enterprise transported millions in cash from New York to Miami and delivered the money to Battle, Jr., Rydz, and Battle Sr. and later, to Marquez, after he relocated to Florida.

The testimony at the trial in the instant matter showed that the enterprise expanded quickly to the point where by 1988, it operated 250-300 spots and 12-15 offices for processing bets, counting cash and keeping records. It involved the use of bankers who, in exchange for operating spots, would be reimbursed for operational overhead, would be provided protection, and would receive a portion of the profits.

Competition with Davila increased. In response to Davila's establishment of competing spots in violation of the two-block rule, the enterprise began an arson campaign, burning out spots in order to protect its share of the business, maintain the respect of its competitors and preserve the loyalty of its bankers and employees. The enforcers were paid to commit bodily harm, arson, and murder. From 1983 through 1984, one enforcer paid a thug for 30 to 35 arsons of rival bolita spots. Some arsons resulted in deaths. The Corporation established an account called "UNESCO" to pay for these arsons and other enforcement actions, including bail and legal*288 defense of enterprise employees or associates. Battle, Jr. did not favor the arsons and preferred to negotiate when the two-block rule was violated; in fact, Battle, Jr. never authorized an arson before it was committed. Nevertheless, both Rydz and Battle Jr. continued to receive bolita profits while the arson campaign raged on and for years thereafter. Acuna served as Battle Sr.'s bodyguard and personal assistant. He also worked as an enforcer, collecting money from delinquent debtors, sometimes by force.

2. Money Laundering

**4 The evidence at trial further established the laundering of the enterprise's bolita proceeds. Battle, Jr., Rydz, Battle, Sr., Marquez and others-with the help of the accountant for the criminal organization, Orestes Vidan concealed the enterprise's proceeds in domestic and foreign bank accounts and foreign corporation's bank accounts (located in Panama and

Curacao). Battle, Jr. and his co-conspirators used nominee names or "front men" to hide the true identities of the owners of the money. The main persons used as nominees or "front men" for these foreign corporations were Vidan and Maurilio Marquez, the brother of Marquez, Sr. Marquez, Sr., Rydz, and Battle, Jr. each had foreign bank accounts set up in Switzerland. The money was either wire transferred to the Swiss accounts through nominee accounts in the names of Vidan and Maurilio Marquez, or was body carried directly to Switzerland. They also invested their bolita earnings in real estate or otherwise legitimate businesses to avoid arrest, hide the illegal source of their wealth, and provide for their children. One such business was Union Financial Research ("UFR"), a mortgage company located in Florida, where Battle, Jr. and Rydz worked and in which they had acquired a 25% interest. Another was a clothing manufacturing business.

Cash from the Corporation's illegal gambling operations was also physically carried by members of the conspiracy to Panama, where it was deposited into various foreign bank accounts in the names of various foreign corporations. The most significant of these foreign corporations were Panamanian corporations, Voltaire Trading and Investment Corporation ("Voltaire") and Aztec Financial Enterprises, Inc. ("Aztec"), both of which were incorporated in Panama and utilized to invest in real estate in south Florida, and Stanara N.V. ("Stanara"), which was incorporated in the Netherlands Antilles.

One of the primary money laundering schemes was to transfer the money as "loans" from the foreign corporations to a series of domestic corporations which were partially or wholly owned by members of the criminal enterprise. These corporations would then pay members of the Corporation large salaries. The first one of these domestic corporations was UFR, the mortgage company incorporated in Florida.

In 1983 Rydz and Battle, Jr. were stopped at JFK airport carrying $500,000 in bolita cash that they had obtained from Marquez in New York. The cash was seized. Battle, Jr. was carrying a report of bolita business for the week of April 2, 1983, which listed $2,173,448 in assets and possibly accounts receivable, and the contents of the UNESCO account. The publicity surrounding the seizure caused the bank which had loaned $20 million to UFR to demand the identity of the source of the funds which Battle, Jr. and Rydz had loaned the company. This, in turn, caused Rydz and Battle to cash out of UFR. This return of capital contributions were transferred by Vidan through various foreign bank accounts and ultimately wound up in *289 Union Bank of Switzerland accounts belonging to Battle, Jr. and Rydz.

**5 The evidence at trial also showed that several domestic clothing manufacturing businesses were involved in the manufacturing and sale of women's clothing to further launder illegal gambling proceeds. In order to buy into these domestic companies, Rydz and Battle, Jr. received money in the form of "loans" from another puppet company, Stanara Company

Corporation ("Stanara Corp.") Battle and Rydz also laundered bolita proceeds through commercial real estate corporations which held accounts oversees.

The Corporation also utilized companies to purchase real properties in Florida, construct multi-million dollar homes on the properties, and then "lease" the residences to the owners of the illegal gambling money. This included Voltaire's purchase of 350 Island Drive, Key Biscayne, Florida, using Battle, Sr.'s bolita proceeds; this house was leased by Voltaire to Battle, Jr.'s mother in 1984. Battle, Jr. eventually sold the house for $1.9 million in 2001. Of this, $281,000 received at closing was deposited in Voltaire's account at Ocean Bank, most of which was later wired to Marquez's account in Curacao, and then to a Swiss account owned by Battle, Jr. Voltaire held a $1.3 million balloon mortgage on the house from the buyer, and Battle, Jr. ordered that this mortgage be assigned to Key Financial Services in return for $150,000. Battle owned stock in Key Financial Services, which received interest payments on the house, $285,000 in cash, and then took a loss on the sale in 2002.

Similarly, in 1984 Rydz and Marquez purchased real estate at 730 and 740 Mashta Drive, Key Biscayne, through a Panamanian corporation, Aztec Financial Enterprises; the money came from UFR proceeds as well as other Panamanian accounts containing bolita proceeds. Marquez later transferred title to lot 730 to Battle, Jr.

Rydz and Battle, Jr. supervised the enterprise's bolita operations in New York and New Jersey until early 1989. At a funeral for a family member, Rydz and Battle both expressed to other bolita managers their desire to retire from daily bolita operations. Luis Perez testified that Rydz took a small calendar out of his pocket on which a date was circled, and told a fellow corporation member, "This is the day I'm leaving. Have my totals ready." However, the government maintained at trial that Rydz and Battle, Jr. continued to launder their own and the enterprise's bolita proceeds long after ending their direct involvement in the gambling operation.

Battle, Jr. delayed construction on his Florida residence until 1994; ultimately, Battle, Jr. and Rydz leased the houses from Aztec, after using various corporate accounts, rather than their own names, to finance construction of the houses. Marquez had moved to Florida in 1985 and reviewed bolita reports and visited the various offices until the end of 1995, when he fled to Spain. Battle, Jr. had planned to move to Spain and was beginning to move his bolita money to the Canary Islands. Rydz sold the property located at 740 Mashta Drive for $2,717,500 on June 4, 2001; Battle, Jr. sold 730 Mashta Drive on May 8, 2002. Aztec received $2,128,664.98 at closing for 740 Mashta Drive and $2,866,311.66 at closing for 730 Mashta Drive. At Battle, Jr.'s direction, Vidan deposited these proceeds in Aztec's account at Plantars Bank, then wired $2,400,000 to a corporate account in the Canary Islands.

**6 The Curacao corporation's accounts remained active for some time. In August and September of 1998, it wired $903,000 to Rydz's and Battle, Jr.'s accounts in *290 Switzerland, which were never closed, and in 2000 it wrote certain small payment checks to pay for corporate registration and such.

The daily management of the enterprise's bolita business was conducted by Willie Pozo, and by 1996, the bolita's profits had decreased. From 1985 through 1995, the Corporation took in $2 million in bets weekly; in contrast, from 1995 through 2003, the total diminished to $700,000 weekly. In early 2000, Battle, Sr. threatened to kill Pozo and an associate in order to "take his business back." Marquez continued to receive a share of the Corporation's illegal gambling profits until 2001. The enterprise's central bolita office was managed by Luis Perez, who was arrested in the summer of 2003. When Rydz and Battle, Jr. were arrested in March 2004, they were still receiving money from the commercial real estate business in Miami. The corporate tax returns for El Zapotal, Battle, Sr.'s 20-acre farm in Miami, showed that in 1999, Battle, Sr. gave El Zapotal to Battle, Jr. and his family as a gift, and that corporate returns had been filed from 2000-2002, listing Battle, Jr. as the largest shareholder.

B. PROCEDURAL HISTORY

On May 31, 2005, the grand jury returned a one-count, fifth superseding indictment which charged that from 1964 until the return of that indictment, appellants Battle, Jr. and Acuna, and codefendants

Battle, Sr., Manuel Isaac Marquez, and other named co-conspirators, were employed by and associated with an international criminal enterprise and conspired to violate 18 U.S.C. § 1962(c) by unlawfully conducting and participating in the conduct of the enterprise's affairs through a pattern of racketeering activity, and the collection of unlawful debt, all in violation of 18 U.S.C. § 1962(d). The superceding indictment charged that the objectives and purposes of the Corporation included, but were not limited to, enriching its members through money laundering and the operation of illegal gambling businesses, prevention of the detection of its criminal activities, and preserving its operations and profits through the use of violence and destruction, including but not limited to, acts of murder, arson and assault. The indictment alleged that Acuna was an "enforcer" for the corporation who committed acts of violence and murder on behalf of the enterprise, and that he subsequently became a "Jefe" or boss. The indictment also provided notice of specific acts which would result in enhanced sentences; it charged that Acuna and codefendant Battle, Sr. murdered Torres in 1976.

The superseding indictment charged two alternative theories of liability: (1) engaging in a pattern of racketeering activity which included acts and threats involving murder, arson, illegal gambling, operation of illegal gambling businesses, conspiracy to launder monetary instruments, and use of interstate and foreign commerce facilities in the commission of murder for hire, in violation of federal or state law, in violation of 18 U.S.C. § 1961(1); and (2) collection of unlawful debts incurred and contracted illegal gambling activity, in violation of 18 U.S.C. § 1961(6).

The government also sought forfeiture of numerous assets alleged to have been acquired and maintained in violation of 18 U.S.C. § 1962, and sought the imposition of an approximately $1.4 billion money judgment, pursuant to 18 U.S.C. §§ 1963(a)(1), (a)(2) and (a)(3).

**7 The superseding indictment originally alleged as predicate acts conspiracy to murder and the murder of Idalia Fernandez, the murder of Ernesto Torres, and the murder of Jose Enriquez. However, at the close of the government's case, the *291 court found there was insufficient evidence with regard to certain of the defendants' personal participation in numerous predicate acts. *United States v. Battle, Jr.*, 473 F.Supp.2d 1185 (S.D.Fla.2006). Thus, the court ruled that the murder of Ernesto Torres and conspiracy to murder Idalia Fernandez could be considered only against Acuna. (The government subsequently struck the predicate act alleging the murder of Idalia Fernandez.) The court also ruled that arson and murder by arson could only be considered against Battle, Jr. and co-defendant Marquez; that money laundering through a casino could only be considered against Marquez; that gambling activity that occurred after Marquez and Battle, Jr. had stopped receiving gambling profits could not be considered against them as predicate acts, but could be considered to prove the continuity of the enterprise; and that only illegal gambling activities alleged to have been committed from 1977-1988 could serve as predicate acts of Battle, Jr.'s gambling. The court also ruled that the government could proceed only under the theory that the defendants had agreed to personally participate in the commission of two or

more predicate acts, and could not prove their participation in the conspiracy by showing that they had agreed only to the conspiracy's overall objective.

The trial in this matter commenced on January 9, 2006, and codefendants Jose Aluart, Argelio Jimenez, Battle Sr.,[3] and Gustavo Battle entered guilty pleas. The case against Acuna, Battle, Jr. and Marquez proceeded to verdict. Defendant Battle, Jr.'s motion for judgment of acquittal on the grounds of statute of limitations was denied.

During deliberations the jury asked the following question: "After the withdrawal from the conspiracy, does the use of ill-gotten funds create a continuance of the conspiracy?" After hearing argument from counsel, the court refused to answer the question, asked the jury to reformulate the question and referred the jury to the instructions as originally given. The jury did not reformulate the question. All three defendants were convicted on July 20, 2006 under both theories of liability. The jury also entered a verdict on the forfeiture count in the amount of $1.4 billion.

III. ISSUES AND STANDARDS OF REVIEW

The first issue before us is whether Battle, Jr.'s prosecution was barred by the statute of limitations

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[3] Battle, Sr. was sentenced to 240 months' imprisonment and 60 months' supervised release and the forfeiture of his interest in certain property consistent with the terms of his plea agreement. He died several months after sentence was imposed.

based upon his claim that he withdrew from the conspiracy and did not participate in the daily operational affairs of the Corporation beyond March 16, 1999. Whether there is sufficient evidence to support a conviction is a question of law which this Court reviews *de novo*. *See United States v. Majors*, 196 F.3d 1206, 1210 (11th Cir.1999). The relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The court's refusal to give a supplemental jury instruction is reviewed for an abuse of discretion. *United States v. Cunningham*, 194 F.3d 1186 (11th Cir.1999).

8 Secondly, we must also decide whether the court correctly determined Battle, Jr.'s and Acuna's sentences. These are reviewed ***292 for "reasonableness" using the factors outlined in 18 U.S.C. § 3553(a). Factual findings are reviewed for clear error; review is *de novo* when examining the sentencing court's application of the United States Sentencing Guidelines. *United States v. Williams*, 456 F.3d 1353 (11th Cir.2006).

IV. DISCUSSION

A. THE STATUTE OF LIMITATIONS

There is a 5 year statute of limitations for a **RICO** violation. 18 U.S.C. § 3282; *United States v. Pepe*, 747 F.2d 632, 664 (11th Cir.1984). The defendants

were indicted on March 16, 2004, therefore, they must have participated in the RICO conspiracy until at least March 17, 1999 in order for their prosecutions to be timely. Battle, Jr. argues that the district court erred when it denied his motion for judgment of acquittal, *see U.S. v. Jose Battle, Jr., et al.*, 473 F.Supp.2d 1185 (S.D.Fla.2006), and that it abused its discretion and committed reversible error when it refused to answer the jury's question: "After the withdrawal from the conspiracy, does the use of ill-gotten funds create a continuance of the conspiracy?"

The law of this circuit is that "a conspirator's participation in a conspiracy is presumed to continue until all activity relating to the conspiracy is ceased. Accordingly, [each defendant] is presumed to be a participant for the duration of the conspiracy unless he can overcome the presumption by proving his withdrawal." *United States v. LeQuire*, 943 F.2d 1554, 1563-64 (11th Cir.1991) (citation omitted). Furthermore, "[w]ith respect to conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period." *United States v. Gonzalez*, 921 F.2d 1530, 1548 (11th Cir.1991) (citation and quotation marks omitted). "The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished. Furthermore, the conspiracy is presumed to exist until there has been an affirmative showing that it has terminated." *Id.* (citations and quotation marks omitted); *see also United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir.1994) (no predicate

acts within the five-year period required for RICO conspiracy as long as defendant has not withdrawn); *United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir.1988) (same).

To establish the affirmative defense of a withdrawal from the conspiracy, the defendant has the substantial burden of proving: (1) that he has taken affirmative steps, inconsistent with the objectives of the conspiracy, to disavow or to defeat the objectives of the conspiracy; and (2) that he made a reasonable effort to communicate those acts to his co-conspirators or that he disclosed the scheme to law enforcement authorities. *See LeQuire*, 943 F.2d at 1564; *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987). "A mere cessation of activity in the conspiracy is not sufficient to establish withdrawal." *Id.*

****9** As to the second prong, it is undisputed that Battle, Jr. did not disclose the scheme to law enforcement, but rather, he made it known to his co-conspirators that he wanted to quit his involvement in bolita. This happened in November 1988 when he, along with Rydz, announced at a funeral that they wanted to end their involvement in the demanding daily operations and cease receiving money from the bolita operation. Prior to that time they were heavily involved in monitoring every aspect of the numbers racket, which was a work-intense cash business. Battle, Jr. maintains that because he withdrew from ***293** the conspiracy in 1988, any acts committed by him to conceal the existence of the conspiracy after

withdrawal do not extend the conspiracy as to him. *United States v. Knowles*, 66 F.3d 1146, 1155-1156 (11th Cir.1995). The vast majority of Battle, Jr.'s money laundering pre-dated the March 17, 1999 statute of limitations cut off. Battle argues that spending his ill-gotten gains (what he calls "personal money laundering" and which he admits conceals his "prior" criminality) does not defeat his withdrawal from the conspiracy. According to Battle, Jr., no evidence showed that he laundered any then-active Corporation members' money after November of 1988, or that he laundered the Corporation's money after that date.

At first blush, the case law seems to support this argument. For example, in Knowles, the defendant was an attorney who aided a co-conspirator by secretly facilitating a large cash payment for a drug delivery. Both defendants were found guilty of conspiracy to import and distribute drugs even though the attorney, Knowles, played no overt role in actual importation or distribution of drugs. Judge Clark explained:

> The Supreme Court has unambiguously held that acts of concealment are not part of the original conspiracy ... Concealment of the enterprise "indicate[s] nothing more than that the conspirators do not wish to be apprehended-a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord." Thus, if Knowles' actions lead to no more than an inference that he was attempting

> to conceal the conspiracy, we would be compelled to reverse the conviction.

Id., *citing Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

In *United States v. Starrett*, 55 F.3d 1525 (11th Cir.1995), as evidence of his withdrawal from the Outlaws gang, which was indicted on July 29, 1986, defendant Duke offered the following: he added a 1980 "out date" to his Outlaw Charlie tattoo; he sold his motorcycle; he joined a church and got a job; and he moved out of Florida and "cut off virtually all contact" with the Outlaws. This Court explained that:

> even if this evidence is sufficient to satisfy this circuit's first requirement for proving withdrawal from a conspiracy-that he took affirmative steps to disavow the conspiracy-it is insufficient to satisfy the second requirement. Duke has not pointed to any evidence in the record to indicate that he made a reasonable effort to communicate his withdrawal to his co-conspirators, or that he disclosed the Outlaws' criminal schemes to law enforcement.

**10 *Id.* at 1550, *citing LeQuire*, 943 F.2d at 1564.

In answer to the above-cited case law, the government argues that this case is different. Here, money laundering is one of the predicate acts and one

of the goals of the conspiracy. Concealment is an integral part of money laundering. The government's position is that Battle, Jr.'s acts of money-laundering occurring within the limitations period count as acts in furtherance of the conspiracy.

In response, Battle argues that his money-laundering activities involved *only his own* ill-gotten gains (not money from the continuing enterprise), and thus he was not actively engaged in the conspiracy. Otherwise, he argues, there is no way in which a member could have withdrawn from this conspiracy.

Withdrawal from the conspiracy is a permissible defense to an action brought under § 1962(d) when a defendant can ***294** prove she took affirmative steps, *inconsistent with the objectives of the conspiracy*, to disavow or to defeat the conspiratorial objectives. *See United States v. Butler*, 41 F.3d 1435, 1446 (11th Cir.1995) (emphasis added) (noting continued participation in the conspiracy is presumed unless defendant takes affirmative steps inconsistent with the conspiracy). Additionally, the defendant must have either made a reasonable effort to communicate those steps to her co-conspirators or disclosed their scheme to law enforcement authorities. *Id.*; *see also Starrett*, 55 F.3d at 1550 (upholding rejection of defendant's withdrawal defense because he had not communicated his withdrawal to his co-conspirators or disclosed the scheme to law enforcement officials).

[1]We find that Battle, Jr.'s mere cessation of one activity of the conspiracy-receipt of profits in exchange for overseeing the daily operations of bolita-

is not sufficient to establish withdrawal from the entire conspiracy in this case. The defendant cites United States Supreme Court case precedent in which the court found that concealment did not continue the conspiracy. However, these cases are distinguishable because the conspiracy had actually ended and the objectives of the conspiracy had been met prior to the concealment.

In *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), the trial court permitted the government to introduce a co-conspirator's statements about how the crime should be concealed. The question before the Court was whether such hearsay declarations could be introduced against one of the conspirators; the declarations in question were made by one named in the indictment as a co-conspirator after the main object of the conspiracy had been accomplished. The Court reversed the conviction, and rejected the government's arguments that the conspiracy was not ended since it included an implied subsidiary conspiracy to conceal the crime after its commission, and that the declarations were therefore still in furtherance of the conspiracy and binding on co-conspirators.

**11 Similarly, in *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), the defendants were convicted of conspiring to defraud the government in its administration of the tax code. They appealed their conviction on the grounds that the prosecution was barred under the statute of limitations because the conspiracy's goals were attained well before the limitations period had begun.

The Indictment explicitly charged that part of the conspiracy was an agreement to conceal the conspirators' acts. Thus, the Court was faced with a criminal conspiracy and a continuation of the secrecy after the accomplishment of the crime. The Court reversed. In so doing, it expressed concern that "allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely." 353 U.S. at 402, 77 S.Ct. at 972, 1 L.Ed.2d 931.

In this case, however, the conspiracy had multiple objectives and continued long after Battle, Jr.'s alleged withdrawal. The Corporation was formed for the purpose of enriching mostly those people at the top of the organization, and those individuals continued to receive profits well after 1999. The evidence at trial showed that Battle, Jr. laundered money through real estate transactions and sham accounts after that date. He sold his house in 2001; title to that property was never put in his name so that the ownership interest-the source of the ill-gotten gains-was hidden. After he ***295** left the bolita operation he continued to launder the money and put it in offshore accounts in the names of other people and entities with the unlawful purpose of protecting the ongoing conspiracy. From 1982-1984 at Battle, Jr.'s direction, $300,000 in Battle, Sr.'s bolita proceeds were sent from Panama to purchase 350 Island Drive in Key Biscayne, followed by $591,000 in bolita proceeds to build a house, which was leased by Voltaire in May 1984 to Battle, Jr.'s mother. Battle, Jr. sold that property in August 2001 for $1,900,000.

The $281,000 received at the closing was deposited in Voltaire's account at Ocean Bank, and on August 2, 2001, $230,000 was wire-transferred to Maurilio Marquez' account in Curacao, then to Battle Jr.'s Alex Trust Swiss account at the Union Bank. The listed representatives of Voltaire were Vidan and Maurilio Marquez, however, the company was controlled by Battle, Jr. Consequently, through Voltaire, Battle, Jr. was laundering his father's share of illegal gambling proceeds. Voltaire held a $1.3 million balloon mortgage on the house from the buyer, and Battle, Jr. directed that Voltaire assign the mortgage to Key Financial Services in return for $150,000. Battle, Jr. owned stock in Key Financial Services, which received interest payments on the house, $285,000 in cash, and then took a loss on the sale in 2002.

Even if the monies that were laundered were actually individual profits from the illegal bolita gambling of the Corporation, and no longer proceeds owned by the Corporation itself as an enterprise, as an associate and member of the Corporation Battle, Jr. facilitated and carried out the goals and objectives of the enterprise to conceal illegally obtained money through various money laundering ventures, and, in so doing, concealed, promoted, and protected the Corporation and its members and associates. In so doing, Battle, Jr. did not withdraw, he continued to carry out the goal and object of the Corporation, as alleged in the Superseding Indictment, to prevent the detection of its criminal activities by laundering the money:

> **12 through various means, including using the PUPPET COMPANIES, and the transfer and commingling of illegal funds through and with other funds and accounts, as well as the creation and perpetuation of 'sham' businesses, investments, and employment positions that appeared to be legitimate but were, in fact, a covert method of money laundering, all as an instrument to promote their illegal activities, conceal their illegal proceeds and avoid their reporting obligations as required by law.

Superseding Indictment, page 13.

The Corporation was described as "an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the Corporation." It was alleged that the Corporation enriched its members and associates through various forms of illegal activity including acts of money laundering and that it undertook all steps necessary to prevent the detection of its criminal activities, and sought to prevent and resolve the imposition of any criminal and civil liabilities upon the Corporation and its members and associates. It also alleged that "members and associates" of the Corporation "did violate the money laundering laws of the United States through various means." This is exactly what happened here. Battle, Jr. took his money, as well as Rydz, Battle, Sr.'s and Marquez's, and with the aid of Vidan, laundered it in

order to prevent detection of the Corporation's criminal activities.

B. THE QUESTION FROM THE JURY

Finally, we are asked whether the court abused its discretion when, in responding ***296** to the jury's question with respect to the withdrawal defense, it directed the jury to review the instructions again and reformulate the question if it wished. Battle urged the court to answer this question "NO," pursuant to *United States v. Adkinson*, 158 F.3d 1147, 1160 n. 23 (11th Cir.1998). The government argued that the question was vague and that the court should instruct the jurors to review the instructions. The court told the jury it could not answer the question without making assumptions about what the jury had decided. He permitted them to reformulate the question and to review the Withdrawal Defense Instruction, as well as the instructions as a whole. The court found, and the government argues on appeal, that *Adkinson* is not pertinent to the issue because *Adkinson* did not involve money-laundering as an activity, but rather concerned how the defendants had spent their ill-gotten gains (related to concealment), which was irrelevant to the main issue of the conspiracy in *Adkinson* (whether there was a bank fraud). There is no argument that the jury instruction as originally given was improper. The jury did not reformulate the question.

Based on our analysis as discussed *supra*, we find that the district court did not abuse its discretion in this regard.

C. APPEAL OF ACUNA AND BATTLE, JR.'S SENTENCES

1. Acuna's Sentence

The jury found that Acuna committed numerous predicate acts as part of a pattern of racketeering activity, including several acts of gambling, conspiracy to murder and the murder of Ernesto Torres, and conspiracy to murder Idalia Fernandez. On appeal, Acuna argues that his life sentence is unreasonable in light of the 18 U.S.C. § 3553(a) factors, because the court failed to account adequately for his age, poor health, and low likelihood of recidivism.

**13 "We review the sentence imposed by the district court for reasonableness." *United States v. Talley*, 431 F.3d 784, 785 (11th Cir.2005). Reasonableness review requires that the appellate court review the sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 594, 169 L.Ed.2d 445 (2007). As the Supreme Court recently instructed, we:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately

> explain the chosen sentence-including an explanation for any deviation from the Guidelines range.

Id., 552 U.S. 38, 128 S.Ct. at 597, 169 L.Ed.2d 445. In providing a statement of reasons for the sentence imposed, the district court "[s]hould set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2468, 168 L Ed.2d 203 (2007).

If the district court's decision is procedurally sound, our analysis then turns to the substantive reasonableness of the sentence. *See Gall*, 552 U.S. at ----, 128 S.Ct. at 597. "In reviewing the ultimate sentence imposed by the district court for reasonableness, we consider the final sentence, in its entirety, in light of the § 3553(a) factors." *United States v. Thomas*, 446 F.3d 1348, 1351 (11th Cir.2006). The § 3553(a) factors include:

> ***297** (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the

> Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims.

Talley, 431 F.3d at 786 (summarizing 18 U.S.C. § 3553(a)). However, "nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors." *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir.2005). Instead, an explicit acknowledgment that the district court has considered the defendant's arguments and the § 3553(a) factors will suffice. *Id.* at 1329-30. "[T]he party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in light of both [the] record and the factors in section 3553(a)." *Talley*, 431 F.3d at 788.

**14 [2] Nothing in the record suggests that the court committed clear error of judgment in weighing the § 3553(a) factors and arriving at Acuna's sentence. The sentence is reasonable in light of the crimes he committed in furtherance of the RICO conspiracy, the need to provide just punishment, and the need to protect the public. The court explicitly found that the evidence established that Acuna was an enforcer for the enterprise and that he committed the murder of Torres and engaged in the conspiracy to murder Fernandez at the direction of Battle, Sr.

Here, Acuna has not met his burden of demonstrating that his within-range sentence is either procedurally or substantively unreasonable. Therefore, we affirm.

2. Battle, Jr.'s sentence

Battle, Jr. argues that the court erred in departing upward from the guidelines, and that the guideline range should have been 46 to 57 months' imprisonment; in light of his range, his 188 months sentence is unreasonable, he claims. Battle, Jr. also argues that the forfeiture order is grossly disproportionate to his offense and, therefore, a violation of his rights under the Eighth Amendment. Because he has not met his burden of demonstrating that his sentence is unreasonable in light of the record and the 18 U.S.C. § 3553(a) factors, we affirm.

Initially, Battle, Jr. faced a guideline range of 46 to 57 months. The court, however, upwardly departed and sentenced Battle, Jr. to 188 months, and imposed a forfeiture money judgment in the amount of $642 million dollars against him. Battle, Jr. now argues that the district court erred in departing from the guidelines, or in the alternative, the sentence was not reasonable in light of the 18 U.S.C. § 3553(a) factors. The district court plainly stated that it would have reached the sentence that it ultimately imposed based on its analysis of the § 3553(a) factors and independent of it resolution of the issues relating to Battle, Jr.'s guidelines calculations.

"After the Supreme Court's decisions in *Booker* and *Gall*, the district courts are still required to correctly

calculate the advisory Guidelines range." *United States v. Livesay*, 525 F.3d 1081, 1089 (11th Cir.2008). However, "[t]he Supreme Court and this Court have long recognized that it is not necessary to decide guidelines issues ***298** or remand cases for new sentence proceedings where the guidelines error, if any, did not affect the sentence." *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir.2006); *see Williams v. United States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992) ("[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.").

Accordingly, we need not resolve disputed guidelines issues where the district court has stated, as it did here, that "the guidelines advice that results from the decision of those issues does not matter to the sentence imposed after the § 3553(a) factors are considered," and we conclude that "the sentence imposed through the alternative or fallback reasoning of § 3553(a) [is] reasonable." *Keene*, 470 F.3d at 1349. "In determining whether it is reasonable we must assume that there was a guidelines error-that the guidelines issue should have been decided in the way the defendant argued and the advisory range reduced accordingly-and then ask whether the final sentence resulting from consideration of the § 3553(a) factors would still be reasonable." *Id.*; *see United States v. Dean*, 517 F.3d 1224, 1232 (11th Cir.2007) (applying *Keene* and holding that, assuming the district court erroneously calculated the defendant's guidelines

range, the sentence nevertheless "was reasonable and stands despite the disputed guidelines issue").

**15 [3] In applying the standard of *Gall*, discussed *supra*, we find that Battle Jr.'s sentence was reasonable in light of the record and the factors in § 3553(a). The court considered the § 3553(a) factors and specifically detailed the nature and circumstances of the offense, Battle, Jr.'s history and characteristics, the need to promote respect for the law and provide adequate punishment, the seriousness of the RICO offense and Battle, Jr.'s underlying racketeering activities, and the need to avoid unwarranted sentencing disparities. The court stated that he played a leadership role in the enterprise which lasted over a very substantial period of time and was significant in scope. It further found that the amount of gambling proceeds was "staggering"; we cannot dispute this as the government showed that the Corporation's gambling operations generated $1.4 billion in proceeds, $642 million of which were generated during the time period in which Battle received gambling profits. Moreover, the court stated on the record that it accounted for the sentences of co-conspirators who were only involved in the Corporation's money laundering activities, and not also in the gambling operations. We also note that Battle, Jr.'s 188-month sentence was well below the 240-month statutory maximum.

Here, Battle, Jr. has not shown that the court abused its discretion and imposed an unreasonable 188-month sentence, even with an assumed guidelines

range of 46 to 57 months. As a result, we affirm without deciding the contested guidelines issues, because even if we resolved those issues in Battle's favor, the district court "has already told us that it would impose exactly the same sentence" based on the § 3553(a) factors and independent of its application of the guidelines. *See Keene*, 470 F.3d at 1350.

3. Battle, Jr.'s Forfeiture Order

In support of its verdict of guilty of conspiracy to commit racketeering, the jury found that Battle, Jr. committed eight predicate acts of money laundering, along with numerous predicate acts of, inter ***299** alia, gambling and conspiracy to commit money laundering. At the hearing on the issue of forfeiture, Detective David Shanks testified to his review of the evidence that the government demonstrated at trial the amount of money collected by the Corporation during various parts of the RICO conspiracy. He stated that in the time period from 1979 until 1980, the Corporation's gambling operations generated an average of $175,000 per week and that during the period from 1981 until 1988, it generated an average of $1.5 million per week. Battle, Jr. was a leader of the Corporation's gambling operations and until 1989, received a share of the gambling proceeds. We also note that the jury entered a special verdict finding that the Corporation's racketeering activities generated $1.4 billion in proceeds.

"We review *de novo* the district court's legal conclusions regarding forfeiture and the court's

findings of fact for clear error." *United States v. Browne*, 505 F.3d 1229, 1278 (11th Cir.2007) (citations and quotations omitted), petition for cert. filed U.S. March 17, 2008 (No. 07-1190). "Whether a forfeiture order is constitutionally excessive under the Eighth Amendment is also subject to *de novo* review." *Browne*, 505 F.3d at 1278.

**16 An individual who violates § 1962 "shall forfeit to the United States ... (1) any interest the person has acquired or maintained in violation of [s] 1962 ... and ... (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [s] 1962." 18 U.S.C. §§ 1963(a)(1) and (3). "Forfeitures are subject to the Eighth Amendment's prohibition against excessive fines 'if they constitute punishment for an offense[,]' " and "[s]ubject forfeitures violate the Excessive Fines Clause if they are 'grossly disproportional to the gravity of the defendant's offense.' " *Browne*, 505 F.3d at 1281 (quoting *United States v. Bajakajian*, 524 U.S. 321, 328, 337, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998)). "This, in turn, is determined by examining three factors: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." *Browne*, 505 F.3d at 1281 (summarizing *Bajakajian*).

[4] As to these factors, Battle is "precisely the type of person toward whom RICO is principally directed ..."

because he committed racketeering activities, as the contemplated by the forfeiture statute. *Browne*, 505 F.3d at 1282. Moreover, as to the second factor, the maximum sentence that could have been imposed was 20 years imprisonment, and the maximum fine was twice the amount of gross gain that Battle derived from the RICO enterprise. *See* 18 U.S.C. §§ 1963(a), 3571(d). Unlike *Bajakajian*, these penalties suggest a significant level of culpability. *See* 524 U.S. at 338, 118 S.Ct. at 2038; *see also Browne*, 505 F.3d at 1282 ("That Congress authorized a maximum fine of $250,000 and 20 years' imprisonment each for Counts 1 and 2 further underscores that it viewed such violations as serious transgressions."). Turning to the third factor, the harm caused by Battle, Jr.'s involvement in this RICO enterprise was also significant. The jury found that he committed eight separate acts of money laundering, and this Court has observed that "[e]ach unlawful monetary transaction harms society by impeding law enforcement's efforts to track ill-gotten gains." *United States v. Martin*, 320 F.3d 1223, 1227 (11th Cir.2003). The laundered funds were derived from illegal gambling operations, which involved numerous acts of violence targeted ***300** at rival businesses; Battle, Jr. was in a leadership position at the time such violent acts were committed and approved payments for such acts from the UNESCO account.

In sum, we find that the forfeiture order, albeit a huge sum, was not grossly disproportionate to the RICO offense, which at one point generated $1.5 to $2 million per week in gambling proceeds, and which involved acts of violence to protect gambling operations and acts of money laundering to conceal

the unlawful funds derived therefrom. The court's $642 million forfeiture order was not grossly disproportionate to Battle's RICO offense. Therefore, we affirm.

****17 SENTENCES AND FORFEITURE ORDER AFFIRMED.**

C.A.11 (Fla.),2009.
U.S. v. Acuna
313 Fed.Appx. 283, 2009 WL 415592 (C.A.11 (Fla.))

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APPENDIX B

473 F.Supp.2d 1185, 20 Fla. L. Weekly Fed. D 395

(Cite as: 473 F.Supp.2d 1185)

United States District Court,

S.D. Florida.

UNITED STATES of America,

v.

Jose Miguel BATTLE, Jr., et. al., Defendants.

No. 04 20159 CR GOLD, 04 20159 CR BANDSTRA.

June 16, 2006.

ORDER

GOLD, District Judge.

For Fed.R.Crim.P. 29 purposes, and pursuant to Fed.R.Evid. 103(c), I enter the following rulings and analysis on certain outstanding legal issues:

A. ***Scope of the Alleged Enterprise***

The Defendants claim that the evidence adduced at trial establish that the "CORPORATION," as the charged enterprise did not come into existence until

the early 1980's and, therefore, any predicate acts and activities occurring in the 1970's are outside the scope of the charged enterprise conspiracy. This issue has arisen with regard to evidence relating to the Ernesto Torres ("Torres") murder and the testimony of former New Jersey police officer Diego Mella. For Rule 29 purposes, I address, here, the structure and membership of the "enterprise" in the 1970's, and the relationship of the murder to the organization.

An analysis of the issue must begin with the definition of "enterprise" under the RICO statute. For RICO purposes, an "enterprise" "[i]ncludes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the United States Supreme Court stated: "The enterprise is an entity, for present purposes a group of persons associated together for a *common purpose* of engaging in a course of conduct .... [This element] is proved by evidence of an *on going organization*, formal or informal, and by evidence that the various associates function as a *continuing unit*." *id.* at 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (emphasis added). The *Turkette* Court alluded to the fact that proof of a pattern of racketeering activity could also be used to show the existence of an enterprise. *Turkette*, 101 S.Ct. 2524 ("While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other."). Post *Turkette*, the

Eleventh Circuit, in *United States v. Weinstein*, 762 F.2d 1522, 1536 (11th Cir.1985), stated that: "... the definitive factor in determining the existence of a RICO enterprise was an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes (the pattern of racketeering activity requisite to the RICO violation)."

In several cases, the Eleventh Circuit has addressed the breadth of a RICO "enterprise." In *United States v. Pipkins*, 378 F.3d 1281, 1281 (11th Cir.2004), *vacated on other grounds*, 544 U.S. 902, 125 S.Ct. 1617, 161 L.Ed.2d 275 (2005), the Supreme Court explained: "An enterprise can consist of 'a group of persons associated together for a common purpose of engaging in a course of conduct ...proved by the evidence of an ongoing organization, formal or informal, and by the evidence that the various associates function as a continuing unit.' " (citation omitted). The Court further explained: "[A]n enterprise can exist in the absence of a formally structured group (citation omitted), which can be even 'be a myriopod criminal network, loosely connected but connected nonetheless.' We have held that there is no difference, for enterprise purposes, between a duly elected corporate board and an 'an amoeba-like infra-structure' in control***1191** of criminal activity." *Id.* Thus, there can be a "core" group of players with others that would participate in various means and ways, or even many ventures or individual conspiracies, provided there is " 'one enterprise, one common purpose, and one over-

arching conspiracy.' " *Id.* at n. 4. (quoting *United States v. Valera*, 845 F.2d 923, 929 (11th Cir.1988)).

[1][2] The Eleventh Circuit has held that proof of an association's devotion to "making money from repeated criminal activity ... demonstrates an enterprise's 'common purpose of engaging in a course of conduct, regardless of whether the criminal activity is diverse.' " *United States v. Church*, 955 F.2d 688, 698 (11th Cir.1992). Thus, an enterprise may consist of a core leader[1] and a changing roster of associates that were engaged, at various times, in obtaining income from illegal acts; secretly laundering illegally obtained money by funneling it into legitimate businesses; protecting the income by concealing the enterprise's ownership of the businesses; and protecting the members' interests in the businesses by violence. In *Church*, the "enterprise was devoted to making money from repeated criminal activity, and protecting that money by any means necessary." *Id. See also United States v. Weinstein*, 762 F.2d 1522, 1537 (11th Cir.1985) (quoting *United States v. Elliott*, 571 F.2d 880 (5th Cir.1978)) (the definitive factor in determining the existence of a RICO enterprise was an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes (the pattern of racketeering activity requisite to the RICO violation)).

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[1] An enterprise need not have a formal hierarchy. *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.1983).

[3] For Rule 29 purposes, the evidence sufficiently establishes that Battle, Sr. was the core leader of a large bolita gambling organization during the 1970's that operated in the New York area. However, the organization is distinct from Battle, Sr., although he was, at different times, its leader. The evidence also establishes that in the late 1970's, the organization was not known by the unofficial name of "THE CORPORATION." The organization charged in the Superseding Indictment existed nonetheless. It was structured in multiple tiers relating to the placing and collecting of illegal bets from various forms of illegal gambling. The organization was devoted to making as much money as possible through repeated bolita gambling. It also existed to protect that money by any means necessary. A key unifying factor for the ongoing organization during the 1970's, that tied it together as a continuous unit, was the respect and fear that Battle, Sr. instilled in others for the purpose of protecting the money-making interests of his organization. When necessary, violence was a tool used by the organization to effectuate this purpose. This ongoing factor continued to exist, according to Abraham Rydz ("Rydz"), even when Battle, Sr. was incarcerated in the 1970's.

With regard to the Torres murder, the evidence sufficiently establishes that Torres originally worked as an enforcer and later as a boilta banker for the Battle, Sr. organization in the 1970's. He left the organization because of a dispute with Battle, Sr. over his own outside gambling activities, which Battle, Sr. believed were inconsistent with the

interests of the organization. Torres also owed the organization bolita money he collected as a banker.

Thereafter, Torres and Carlos ("Charlie") Hernandez ("Hernandez") entered their own conspiracy to kidnap and extort ***1192** other bolita bankers that worked for Battle's organization. One such bolita banker was Luis Marrero ("Marrer"), who was related to Battle, Sr. Torres kidnapped and later killed Marrero. Battle, Sr. learned of Torres' involvement. Thereafter, members of the organization attempted to kill Torres on a number of occasions. Battle, Sr. eventually contracted with Hernandez to kill Torres and his girlfriend, Idalia Fernandez ("Fernandez"), who knew Battle, Sr. and who was knowledgeable about Torres' activities. The evidence sufficiently established that the Torres murder and the attempted murder of Fernandez were in furtherance of the RICO enterprise's conspiracy to punish the kidnaping and extortion of the organization's bolita bankers, including Marrero. Such killing also furthered the name and reputation of the RICO enterprise as charged in the Superseding Indictment. The evidence sufficiently established that the murder and attempted murder were committed by Julio Acuna ("Acuna") who was an enforcer for the organization and who acted under the direct orders of Battle, Sr. Defendant Acuna's role in this murder was set forth in the Superseding Indictment and his Bill of Particulars.

[4] The issue, then, is whether this evidence is encompassed by the Superseding Indictment. I conclude that the Superseding Indictment and

Acuna's Bill of Particulars are broad enough to include the Torres murder and conspiracy to murder Fernandez. The point is that the Superseding Indictment, while collectively referring to the enterprise as the "CORPORATION," more specifically refers to the "enterprise" as an international criminal organization known by various names, including the CORPORATION and the "Cuban Mafia." The CORPORATION is not charged as a "legal" entity. Rather, the Superseding Indictment refers to the "enterprise" as a group of individuals and entities associated in fact, including its leadership, membership and associates. The Superseding Indictment refers to the "enterprise" as an ongoing organization whose members functioned as a continuing unit for the common purpose of achieving the objectives of the CORPORATION. The Superseding Indictment alleges that Battle, Sr., Acuna and others engaged in illegal activities from 1964 through the time of the filing of the Indictment.[2]

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[2] Battle, Jr. cites *United States v. Weissman*, 899 F.2d 1111 (11th Cir 1990) in arguing that the Government's early 1970's evidence constituted an "amendment" to the Superseding Indictment. An amendment occurs when the charging terms of an indictment are altered. *Id.* at 1114. Battle, Jr.charges that the evidence constructively amended the indictment and constitutes per se reversible error because such an amendment violates his constitutional right to be tried only on charges presented in a grand jury indictment and creates the possibility that he may be convicted on grounds not alleged in the indictment. A variance, by contrast, does not affect the elements of the crimes charged; rather, it occurs when the facts proven at trial differ from those alleged in the indictment. *Id.*

In *Weissman*, the Court held that the trial judge's response to the jury's request for clarification amended the indictment which allowed the jury to convict the defendants of a RICO conspiracy other than the one detailed by the grand jury in the indictment. The Court stated that, based on the indictment in that case, the enterprise was synonymous with the "DeCavalcante family of La Costa Nostra." *Id.* at 1115. Instead of advising the jury of this, the trial judge gave an instruction that the word "enterprise," in accordance with the 18 U.S.C. § 1962(d), meant "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

Here, the Superseding Indictment is not so limited. As stated by the Eleventh Circuit in *Weissman*, the government in styling the indictment could have used the general language of the statute to refer to the enterprise in which the defendants were allegedly involved. *Id.* In this case, the Government did use the statutory definition in describing the CORPORATION. The fact that the label the "CORPORATION" started to be used in the 1980's, when, in fact, Battle, Jr., was a member, does not mean that the Superseding Indictment did not sufficiently allege that the CORPORATION acted through a group of individuals and entities associated in fact during the 1970's. In sum, I find no amendment and no variance. In any event, I have ruled that the early 1970's evidence is admissible only against Acuna.

[5] The evidence sufficiently establishes that the organization evolved with *1193 different members but with the same common purposes and goals over the years. When Battle, Sr. was arrested in the 1970's, the organization diminished in size but continued to do business. It was during this period that Battle, Jr., along with Marquez, Sr., Battle Jr.'s uncle, joined the illegal gambling enterprise in the New York area. While in prison, Battle, Sr. requested that Rydz assist Battle, Jr. Even while in prison, Battle, Sr. remained the leader of the organization. Eventually, Rydz also joined the organization in the early 1980's primarily because of Battle, Sr.'s reputation. Upon release from prison, Battle, Sr. rejoined the organization and assumed a leadership role along with Battle, Jr., Rydz, Marquez, Sr. and others. It was during the period after Battle, Sr.'s release from prison that the organization was informally referred to by its members and others as the CORPORATION. A competing bolita organization was known as the COMPANY. The name "CORPORATION" was merely a label, among other labels, given to an international criminal organization involving a group of individuals and entities associated in fact. Rydz, Battle, Jr., and Marquez eventually assumed leadership positions until they ceased taking illegal profits from the CORPORATION. For purposes of the bolita New York activities, the leadership of the organization and members of the organization may have changed but the organization remained ongoing through the date of the Indictment. The bolita organization, as originally started by Battle, Sr., continued in fact with the same goals and purposes under the later

leadership of Luis Perez ("Perez"), Jose "Barbita" Guererro, Willie Poso, and others. The organization continued to use the label of the CORPORATION for purposes of identifying it from competing bolita organizations at least through 2003 when Perez was arrested on gambling related charges. There is no requirement that all personnel in an enterprise participate from the beginning to the end of the enterprise's existence. The "continuing unit" aspect of the enterprise may be found to exist even if there are "shifting associations" whose participants overlap to a sufficient degree. *United States v. Hewes*, 729 F.2d 1302, 1311-12 (11th Cir.1984) (RICO enterprise existed through "an informal, de facto association dedicated to the purpose of maintaining a network of interdependent fraud schemes.").[3]

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[3] In *United States v. Johnson*, 440 F.3d 832 (6th Cir.2006), the Sixth Circuit held that it does not read *Turkette* to hold that proof of the various separate elements be distinct and independent, as long as the proof offered is sufficient to satisfy both elements. 440 F.3d at 840. It also cited to *Church* with approval that the common purpose of making money can support the enterprise element of a RICO conspiracy. *Id. Church*, 955 F.2d at 698 ("This circuit [Eleventh Circuit] has held that proof of an association's devotion to making money from repeated criminal activity demonstrates an enterprises common purpose of engaging in a course of conduct, regardless of whether the criminal activity is diverse.") (citation and quotation marks omitted). In *United States v. Smith*, 413 F.3d 1253 (10th Cir.2005), the Tenth Circuit joined other circuits in holding that the Government establishes an enterprise when it proves three elements. Fist, the Government must prove the existence of "an ongoing organization with a decision-making framework or mechanism for controlling the group." (citations omitted). Second, the Government must prove "that the various associates function as a continuing unit." (citation omitted). Finally, it must prove that the enterprise exists "separate and

1194 B. *Admissions of Portions of Prior Trial Testimony of Charley Hernandez and Idalla Fernandez

[6][7][8] I have previously considered and ruled on this matter of record on April 13, 2006. I incorporate that ruling here which commences on page 173 of the transcript. At that time, I ruled that the prior trial testimony of Hernendez and Fernandez from the trial of *State of Florida v. Jose Miguel, Battle, Sr.*, Case No. 76-26442, Circuit Court in and for Dade County, Florida, is admissible against Acuna who was not a defendant in that case. [4] I also concluded, for purposes of Fed.R.Evid. 804(a)(4) that Fernandez was not "available" as a witness because she was killed after the state trial against Battle, Sr. and prior to his retrial. Her death certificate was admitted in

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apart from the pattern of racketeering activity." *id.* at 1266-1267. For Rule 29 purposes, I conclude that the Government has sufficient demonstrated that all of these elements have been met in this case.

[4] I also ruled that it was admissible against Defendant Battle, Sr. before he pled guilty during the pendency of this trial. The state case was brought against Battle, Sr. for conspiracy to murder Torres and solicitation of a felony. The jury found him guilty. The conviction was reversed by the Florida Third District Court of Appeals and remanded for a new trial. *Battle v. State of Florida*, 365 So.2d 1035 (Fla. 3d DCA 1979). Prior to the second trial against Battle, Sr. [and a first state trial against Julio Acuna], Fernandez was murdered while in protective custody and Hernandez fled. Battle, Sr. pled for "credit time served" and the charges were dismissed against Acuna for lack of evidence.

evidence. After a Rule 104 hearing where Hernandez appeared under a material witness warrant, I concluded, with the consent of the Defendants, that he was unable to testify because of his then physical and mental infirmity. I further found that the requirements of Fed.R.Evid. 804(b)(1) were met against Battle, Sr.[5] I also held that the trial testimony was admissible against Acuna on two separate grounds. First, I held that, under the authority of the Eleventh Circuit's decision in *United States v. Deeb*, 13 F.3d 1532 (11th Cir.1994), that the Hernandez and Fernandez testimony was admissible against Acuna under the residual hearsay exception [now Fed.R.Evid. 807] and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). I discussed my reasoning in the transcript. Transcript of April 13, 2006, pp. 121-24. I further concluded that the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) did not trump *Deeb* here because (1) both Hernandez and Fernandez were unavailable; and (2) Acuna had the opportunity to depose Hernandez and Fernandez in the state criminal proceedings, and offer the deposition testimony as part of the cross-examination read into the record in this case in addition to the cross-examination from the Battle, Sr. state trial. *Crawford* does not require, for Confrontation Clause purposes, that the prior cross-examination occur during trial so long as there is an opportunity for

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[5] I found that the evidence was not admissible against Battle, Jr. and Marquez, Sr.

oss-examination. Thus, the opportunity to cross-examine at a preliminary hearing is sufficient. *California v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (1970) (where a defendant was represented by counsel and had an opportunity to cross-examine a trial witness at a preliminary hearing, the witness's preliminary hearing statements were admissible even if the witness was absent from trial). Accordingly, I concluded that the opportunity for cross-examination for *Crawford* purposes was provided by the trial depositions of Fernandez and Hernandez in the ***1195** Acuna state criminal case. These depositions were taken for the purpose of impeaching their testimonies in the [then] upcoming Acuna state trial. The depositions were taken after their direct and cross-examination had occurred in the prior Battle, Sr. trial. Here, Acuna had the opportunity to use a portion of Fernandez's prior deposition as part of the cross-examination in this trial, but elected not to do so.

[9] Second, I concluded that the prior testimony was admissible against Acuna under Fed.R.Evid. 804(b)(6). Transcript of April 13, 2006, pp., at 127-137. I adopt my prior rulings here. I held that the applicable requirements were met by a preponderance of the evidence. Based on my findings, I concluded that Acuna and Battle conspired to murder Fernandez to prevent her from testifying in the Battle, Sr. retrial and the Acuna state trial, regarding the murder of Torres and her own attempted murder. I further held by the preponderance of the evidence, that, as a result of that murder, Hernandez fled for his life and was not

found by law enforcement until 2006, at which time he was incompetent to testify. I concluded that Battle, Sr. and Acuna's wrongdoing procured Hernandez's unavailability in that he feared that he too would be killed if he agreed to testify. [6] Given the unique circumstances, I held that Hernandez was "unavailable" by virtue of the misconduct of Battle and Acuna. After he fled, he had a massive heart attack and became infirm. His recent lack of diminished capacity does not remove the forfeiture through wrongdoing under Fed.R.Evid. 804(b)(6). Acuna should not benefit because Hernandez was recently found by law enforcement but cannot testify due to diminished capacity. Under *Crawford*, the rule of forfeiture by wrongdoing extinguishes Confrontation claims on essentially equitable grounds. 541 U.S. at 62, 124 S.Ct. at 1370. *United States v. Dhinsa*, 243 F.3d 635, 652-53 (2d Cir.2001), summarizing the law from various circuits, holds that Rule 804(b)(6) places no limitation on the subject matter of a declarant's statement that can be offered against a defendant at trial. [7]

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[6] As Hernandez stated at his trial testimony in the Battle, Sr. trial, he talked to the police even before Fernandez was killed because "he was afraid for his life." Transcript from Battle, Sr. Trial, p. 736.

[7] Notwithstanding this broad authorization, I carefully reviewed and ruled upon those aspects of the Hernandez/Fernandez trial testimonies that would be admissible at this trial. Transcript of June 5, 2006, p. 124. I ruled on each of Acuna's objections. I adopt my rulings and reasoning here.

C. Conspiracy to Commit Money Laundering as a Predicate Act

An initial issue is whether a § 1956(h) money laundering conspiracy may be a predicate offense for a § 1962(d) RICO conspiracy. The issue is addressed in *United States v. Pungitore*, 910 F.2d 1084, 1134 (3d Cir.1990), where the Third Circuit held that RICO conspiracy under § 1962(d), and the predicate conspiracy, are distinct offenses with entirely different objectives.[8] The Third Circuit stated that:

> the objective of a RICO conspiracy is to 'assist the enterprise's involvement in corrupt endeavors. In contrast, the objective of the predicate conspiracy is confined to the commission of a particular substantive offense, in this case, individual acts of murder. A RICO conspiracy under 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' as alleged ***1196** by appellants, but is an overall conspiracy to violate a substantive provision of RICO. (internal citations and quotations omitted).

[10] A RICO conspiracy is substantially broader than an ordinary § 371 conspiracy. *United States v.*

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[8] The Eleventh Circuit declined to follow *Pungitore* in *United States v. LeQuire*, 943 F.2d 1554, 1559 (11th Cir.1991) as it related to applying *Grady* to RICO. The Eleventh Circuit did not discuss or disagree with the decision for the principle stated.

Riccobene, 709 F.2d 214, 224-25 (3d Cir.1983); *United States v. Sutherland*, 656 F.2d 1181, 1189-95 (5th Cir.1981); *United States v. Sutton*, 642 F.2d 1001, 1017 (6th Cir.1980) (en banc); *United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir.).

[11] In *United States v. Ruggiero*, 726 F.2d 913, 915 (2d Cir.1984) [9], the conspiracy alleged involved an agreement to operate the Bonnano crime family through a pattern of racketeering activity that "consisted of 13 separate conspiracies to violate various state and federal laws involving the defendants in various combinations." The Second Circuit rejected the defendants' claim that this constituted multiple conspiracies: "Nor does a RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies, violate the prohibition of *Kotteakos v. United States*, [328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)], which prohibits conviction of multiple conspiracies under an indictment charging a single conspiracy." *United States v. Elliott*, 571 F.2d at 900-902. A RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a "conspiracy to conspire", but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any

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[9] The *Ruggiero* decision was abrogated by the United States Supreme Court in *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) as to the issue that RICO conspiracy convictions do not require an overt or specific act.

person associated with an interstate enterprise to "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *United States v. Zemek*, 634 F.2d 1159, 1170 n. 15 (9th Cir.1980).

Ruggiero demonstrates that a RICO conspiracy is broader than a conspiracy to commit a particular crime. *United States v. Barton*, 647 F.2d 224, 236-38 (2d Cir.1981). *Ruggiero* also demonstrates that the fact that different persons agree, as part of the conspiracy, to commit different crimes, does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies.

[12] As further discussed below, the RICO statutes were amended to add money laundering as a predicate act. Specifically, § 1961(1) defines "racketeering activity" to include "any act which is indictable under ... section 1956." Consequently, insofar as the enumerated statute, § 1956 (money laundering), includes, as of October 28, 1992, conspiracy as an indictable offense, money laundering conspiracy may properly be charged as a predicate act under a § 1962(d) enterprise conspiracy, without merely being a "conspiracy to conspire."

D. *Straddle Issues*

The Superseding Indictment charges a racketeering conspiracy that began on or about 1964 through the return of the original indictment on March 16, 2004.

Given the significantly long span of the charged racketeering conspiracy, a number of issues have arisen relating to certain acts that the Government claims to have occurred prior to, or subsequent to, the dates of enactment of relevant statutes. The acts at issue are addressed in the Superseding Indictment and in the Bills of Particulars filed against the three remaining defendants, Jose Battle, Jr., Manuel Marquez, Sr. and Julio Acuna.[10]

***1197** The Superseding Indictment charges an enterprise conspiracy under Title 18, United States Code, § 1962(c). Both sections 1961 and 1962 became effective on October 15, 1970. "A pattern of racketeering activity" requires at least two acts of racketeering activity, one of which must have occurred after October 15, 1970, and the last of which must occur within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5). Several other dates of enactment are significant. Title 18 U.S.C. § 1956 (substantive money laundering)

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[10] The Government acknowledges that the Bills of Particulars filed in this case essentially limit the racketeering predicate acts contained in the Superseding Indictment to only those contained therein. Defendant Acuna's Bill of Particulars is silent as to any money laundering acts. Accordingly, his verdict form will not reflect any money laundering acts as potential predicate offenses. The jury will be instructed that they may not consider any of the money laundering evidence against him. Additionally, because all of the money laundering acts listed in Manuel Marquez's Bill of Particulars are also listed in Battle, Jr.'s Bill of Particulars, the analysis here applies equally to both Defendants Battle, Jr. and Manuel Marquez, Sr.

became effective on October 27, 1986. Title 18 U.S.C. § 1961(1)(B) was amended in 1986 to insert a Section 1956 offense (money laundering) as a "predicate act." This amendment took effect on October 27, 1986. The statute prohibiting conspiracies to launder money, § 1956(h), did not take effect, however, until October 28, 1992.

[13] The Bills of Particulars [for Both Battle, Jr. and Manuel Marquez, Sr.] charge money laundering and conspiracy to launder money under Title 18, U.S.C. §§ 1956(a) and 1956(h). The dates of these acts vary between 1980 and to the date of the Indictment. Accordingly, for purposes of determining which can be a predicate act, it is critical to determine whether activities charged occurred prior or subsequent to October 27, 1986 (substantive money laundering) or October 28, 1992 (conspiracy to money launder). In addition, the type of predicate act involved is of critical importance. Substantive money laundering transactions are offenses completed at the time of the transaction. In other words, substantive money laundering is not a continuing offense. *United States v. Kramer*, 73 F.3d 1067, 1072-73 (11th Cir.1996) (each transaction or transfer of money constitutes a separate offense).

Accordingly, Defendants Battle, Jr. and Marquez, Sr. cannot be convicted based solely on conduct occurring prior to the enactment of the substantive money laundering statute on October 27, 1986, and the money laundering conspiracy statute on October 28, 1992. *United States v. Miranda*, 197 F.3d 1357, 1359 (11th Cir.1999) ("Miranda asserts, and we agree, that

Count 1 improperly sought to convict him for conduct occurring prior to the enactment of the conspiracy statute [section 1956(h)]"). Such a conviction is a "naked ex post facto violation." *Id.*

In other words, the jury must be instructed that they can only check off those predicate acts in the verdict form that were charged in the Superseding Indictment, listed in the Bills of Particulars, and which the Government was able to prove the Defendants committed after the enactment of the relevant statutes. Thus, as to the substantive money laundering offenses set forth in the Bills of Particulars, the unlawful transaction must have occurred subsequent to October 27, 1986 to support conviction.

[14] On the other hand, it is well established that a "[c]onspiracy is a continuing offense .... Where a crime is still being carried on and continued after the date when the act becomes effective, a statute imposing a greater penalty for conspiracy ***1198** does not violate constitutional prohibition of ex post facto laws." *United States v. Abrego*, 141 F.3d 142, 167 (5th Cir.1998) (internal quotations and citations omitted). In *Abrego*, the Fifth Circuit addressed the argument that the defendants' conviction under § 1956(h) violated the Ex Post Facto Clause if any of the conduct in furtherance of the conspiracy occurred before the statute's effective date. The Fifth Circuit found, based on the evidence, that the jury could reasonably conclude that the money laundering conspiracy continued after the effective date of § 1956(h). *Id.* It stated that, where many acts in a

continuing offense occurred before the effective date of the statute criminalizing the continuing offense, the trial court must inform the jury of the effective date of the statute and instruct the jury that, in order to convict the defendant of the offense, it must find that the offense continued after the effective date of the statute. *Id.*

[15] To the same effect, in *United States v. Hersh*, 297 F.3d 1233, 1244 (11th Cir.2002), the Eleventh Circuit held that: "The *ex post facto* clause is not violated ... when a defendant is charged with a conspiracy that continues after the effective date of the statute." The Eleventh Circuit further stated that: "To prove the continuation of a conspiracy, the government may provide evidence showing that an overt act occurred after the amendment of the statute." *Id.* The overt act must be something more than evidence of the conspiracy. It must constitute the execution or part of the execution of the conspiracy. *Id.* at 1245 (citing *Huff v. United States*, 192 F.2d 911, 915 (5th Cir.1951)). It is necessary, therefore, to " ... look to the elements of the offense described in the statute to determine whether an action constitutes an overt act." *Hersh*, 297 F.3d at 1245 (citing *United States v. Helmich*, 704 F.2d 547, 549 (11th Cir.1983) ("noting that overt acts consist of those acts prohibited by the statute as well as other legal acts done in furtherance of the conspiracy.")).[11] Battle, Jr.

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[11] In *Hersh*, the jury instructions clarified that the jury was required to find that (1) Hersh willfully joined into the plan, knowing its unlawful purpose of traveling in foreign commerce to engage in a sexual act with a minor, (2) at least one of the overt acts of travel occurred after the effective date of the

argues that since RICO conspiracy money laundering does not require an overt act, *Hersh* is inapplicable. I reject this argument and conclude that conspiracy to commit money laundering may be included as a predicate act so long as money laundering activities, in furtherance of the conspiracy, occurred after the effective date of the statute.

The straddle issue originally arose in this case based on the objection of Battle, Jr. to certain portions of the testimony of Orestes Vidan ("Vidan"). Battle, Jr. contended that evidence of money laundering that either pre-dated the enactment of the money laundering statutes or post-dated the allegations contained in the Bill of Particulars is not relevant and is barred by Fed.R.Evid. 403. I have overruled the objection and admitted the evidence. I have found it relevant to demonstrate Battle, Jr.'s ongoing participation in the charged RICO conspiracy and to establish the various RICO conspiracy elements, such as association and continuity. With respect to money laundering evidence that post-dates allegations contained in the Bill of Particulars, such evidence is also relevant to establish the various RICO conspiracy elements and to demonstrate Battle, Jr.'s ownership and control of the funds in question. Such evidence also gives the jury the necessary context for understanding the full evolution and extent ***1199** of Battle, Jr.'s money laundering schemes. I also

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amended statute; and (3) the overt act of travel was "knowingly committed ... in an effort to accomplish some object of the conspiracy." *Hersh*, 297 F.3d at 1247.

conclude, under a Fed.R.Evid. 403 analysis, that the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the likelihood of misleading the jury. The same reasoning applies to Manuel Marquez, Sr. with regard to the money laundering charges against him.

[16] More specifically, regarding the money laundering activities that pre-date the effective dates of the statutes at issue, I find that the money laundering evidence is relevant to prove the enterprise's objective to "profit from and establish, operate, manage, facilitate, enhance, conceal, promote and protect the [enterprise] and its members, associates, activities and objectives." Superseding Indictment, ¶ 4. The Government argued convincingly that, because the money laundering was done with the intent to conceal the underlying activity of the enterprise and its members, the evidence would be relevant to prove the RICO conspiracy and its objectives. It is also relevant to establish other elements of the RICO conspiracy such as association between members of the RICO enterprise and the continuity of the enterprise. It constitutes intrinsic evidence to explain how the illegal gambling monies flowed from one entity to another and culminated in an overt act, or financial transaction, after the date of enactment of the relevant statute in furtherance of the enterprise conspiracy. Such evidence is relevant to "allow [ ] the jury to *see* the entire [money laundering] scheme and its results". *United States v. Dillman*, 15 F.3d 384, 391 (5th Cir.1994) (the defendants were convicted of conspiracy, bank fraud, money laundering, and other

crimes committed as part of a scheme to improve artificially the financial condition of a savings and loan they managed. Defendants argued unsuccessfully that the district court committed reversible error by denying their motion to exclude evidence which they claimed was extrinsic. The Court held that the evidence of the path of the second $10 million which was not charged was inextricably intertwined with the overall criminal scheme, and, therefore, was admissible. The district court did not err in allowing the jury to *see* the entire scheme and its results).[12]

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[12] I discuss below the issue associated with Battle, Jr. and Marquez, Sr.'s arguments relative to statute of limitations. In many ways, the straddle argument is analogous to their argument that evidence of acts occurring prior to the statute of limitations period are not relevant and admissible. However, such arguments are routinely rejected because it is necessary for the jury to understand the context of the scheme developed by the defendants. *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 497 (7th Cir.2006) ("[S]tatute of limitation put time limits on when actions may be brought; they are not evidentiary rules that blind courts from consideration of relevant facts ... There is a distinction between acts that are prosecuted and acts that would be barred by the statute of limitations but are admissible to show that an act being prosecuted actually occurred"); United States v. *Barnes*, 230 F.3d 311, 315 (7th Cir.2000) ("Relevant pre-limitations evidence is admissible to show the existence of a scheme to complete an illicit transaction. Here, Barnes's pre-limitations activity was relevant to interpret the meaning of his call to the attorney to set up the emergency meeting"); *United States v. Wellman*, 830 F.2d 1453, 1464 (7th Cir.1987) ("The fact that the scheme, and acts committed in furtherance of it, may have extended over a period in part barred by the statute of limitations does not mean that they are irrelevant in determining whether mailings occurring within the statutory period were in furtherance of a scheme to defraud and thus proscribed by 18 U.S.C. § 1341.").

[17] Like the money laundering evidence that pre-dated the money laundering statutes, the money laundering activities that occurred after those events listed in the Bill of Particulars occurred are also relevant to show the continuation of the ***1200** money laundering scheme to the present. The evidence is admissible to prove the overall scheme and the Defendants' participation in the conspiracy. As such, it is also intrinsic evidence. In addition, it is relevant for statute of limitations purposes.[13] *Huff v. United States*, 192 F.2d at 915 (" 'If [co-conspirators] do continue such efforts in pursuance of the plan, the conspiracy continued up to the time of abandonment or success.' It is this reasoning that lies behind the recognized rule that the statute of limitations ... runs from the last overt act during the existence of the conspiracy of which there is appropriate allegation and proof.") (citations omitted). Like the issue of activities that pre-dated the relevant statutes, the jury must be instructed that they may only consider those crimes listed in the Superseding Indictment and Bill of Particulars as predicate acts that occurred after the effective date of the statutes, and that the other evidence introduced (both before and after the predicate acts) is relevant only as to continuity and the nature and scope of each Defendant's participation in the conspiracy. *United States v.*

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[13] The Defendants have raised statute of limitation defenses. The issues associated with these defenses are discussed below. The jury will be required to answer questions in the verdict form relative to these defenses.

Gonzalez, 921 F.2d at 1547 ("The trial judge in this case clearly instructed the jury to consider as predicates only those crimes so listed in the indictment, and that other evidence introduced was limited to finding of continuity or the nature and scope of Roundy's agreement.").

E. *Enterprise's Money Laundering Activities*

[18] Defendants Battle, Jr. and Marquez, Sr. raise an additional issue as to whether money laundering, and conspiracy to money launder, may constitute predicate acts if it is shown that the "monies laundered" were actually their individual profits from the illegal bolita gambling of the CORPORATION, and no longer proceeds owned by the CORPORATION itself, as an enterprise. The short answer is "yes" because the Government has satisfactorily established by evidence beyond a reasonable doubt, as alleged in the Superseding Indictment, that Battle, Jr., Rydz and Marquez, Sr., are associates and members of the CORPORATION, and that they facilitated and carried out the goals and objectives of the enterprise to conceal illegally obtained money through various money laundering ventures, and, in so doing, concealed, promoted, and protected the CORPORATION and its members and associates.[14] In engaging in such endeavors, they

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[14] In *United States v. Hudson*, 52 F.3d 326 (table), 1995 WL 234680 (6th Cir.1995)(unpublished), the defendant was charged with a RICO conspiracy dealing with prostitution. He argued that the racketeering acts which the jury found him to have committed were not related to the alleged prostitution enterprise. He contended that the financial structuring acts

also undertook to carry *1201 out the goal and object of the CORPORATION, as pled in the Superseding Indictment, to prevent the detection of its criminal activities by laundering the money:

> through various means, including using the PUPPET COMPANIES, and the transfer and commingling of illegal funds through and with other funds and accounts, as well as the creation and perpetuation of 'sham' businesses, investments, and employment positions that appeared to be legitimate but were, in

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were for his own personal benefit and had nothing to do with any enterprise. The Sixth Circuit rejected this argument and stated: "Defendant argued to the jury that he committed the structuring offenses for his personal benefit, not the benefit of the prostitution ring. The jury chose to believe that he was structuring the transaction to further the goals of the enterprise. The record contains sufficient evidence to support this finding." *id.* at *3. The same type of analysis has been made in the drug distribution area. In United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984), the Court held that "a laundering service ... furthers the distribution of controlled substances by concealing the unlawful provenance of the funds thus keeping in business the purveyors of such substance." *See* also, United States v. *Barnes*, 604 F.2d 121, 154-55 (2nd Cir.1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980)(noting that "[i]mporters, wholesalers, purchasers of cutting materials, and persons who 'wash' money are all as necessary to the success of the venture as the retailer."). The same can be said for the subject illegal gambling enterprise at issue in this case. The "washing" of money is a necessary goal to the organization's continued success and its' efforts to avoid detection by law enforcement.

> fact, a covert method of money laundering, all as an instrument to promote their illegal activities, conceal their illegal proceeds and avoid their reporting obligations as required by law.

Superseding Indictment, page 13.[15]

I reject Battle, Jr.'s contentions. I already discussed above that the Superseding Indictment broadly described the CORPORATION as an international criminal association known by various names, and, together with its leadership, membership and associates, constituted the alleged enterprise. It was a "group of individuals and entities associated in

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[15] Battle, Jr. argues that the Superseding Indictment specifically alleges the CORPORATION'S involvement in illegal money laundering schemes through various businesses. He argues that he and Rydz did not take the CORPORATION'S assets and invest them for the benefit of or on behalf of the CORPORATION and its members. Nor did the evidence show that Battle, Jr. and Rydz took the proceeds they realized from the various entities and businesses and re-invested the profits in the CORPORATION. Battle, Jr. argues he is not charged with laundering his own personal funds for his own benefit. He points to specific places in the Superseding Indictment where the word "CORPORATION" was used in reference to the "offshore shelf corporations" and other money laundering activities. Accordingly, Battle, Jr. argues that the money laundering activities discussed at trial were outside the scope of the RICO conspiracy charged in the Superseding Indictment. He further argues that the money laundering activities listed in the Bill of Particulars were outside the scope of the enterprise conspiracy and had "no relation" with the enterprise charged. He narrowly defines the enterprise" as the CORPORATION in New York, not Battle, Jr., and a changing roster of associates.

fact." It was described as "an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the CORPORATION." So, the CORPORATION is not an incorporated legal entity but an association of individuals, members and associates as well as associated entities. It was alleged that the CORPORATION enriched its members and associates through various forms of illegal activity including acts of money laundering. It was alleged that the CORPORATION undertook all steps necessary to prevent the detection of its criminal activities, and sought to prevent and resolve the imposition of any criminal and civil liabilities upon the CORPORATION and its members and associates. It also alleged that **"members and associates"** of the CORPORATION did violate the money laundering laws of the United States through various means (emphasis added). Accordingly, I conclude that the Superseding Indictment is sufficiently broad to include Defendant Battle, Jr., as a member and associate of the CORPORATION who participated in the CORPORATION'S money laundering scheme to carry out its purpose of concealing its illegal proceeds and avoiding detection and prosecutions. Therefore, I find no variance between the CORPORATION'S alleged activities and the effort of Battle, Jr. to conceal his illegal gambling proceeds. A "variance" occurs when the evidence at trial establishes facts materially different from those alleged in the indictment. *Caporale*, 806 F.2d at 1499. I do not consider at this time the issue of prejudice.

Furthermore, I specifically reject Battle, Jr.'s argument that his predicate money laundering acts were not related to the enterprise charged and did not form a "pattern." I conclude that the money laundering acts facilitated racketeering activities by securing them from detection. The two main goals of the enterprise conspiracy, as charged, were to make as much money as possible and not get caught. The structure of the money laundering statute, 18 U.S.C. § 1956, makes it "illegal to engage knowingly in acts involving illegally obtained money either to promote a criminal activity or to **conceal the source of the funds**." *United States v. Abbell*, 271 F.3d 1286, 1294 (11th Cir.2001) (emphasis added). Consistent with the goal of the enterprise, the purpose of the money laundering activity can be to conceal the source of the funds. To constitute a predicate act of money laundering, it is not essential the Battle, Jr. engaged in illegal money laundering to "promote" the CORPORATION'S profits, as long as he laundered money distributed to him in a way that furthered the enterprise conspiracy by "concealing" the source of the funds.

The evidence sufficiently demonstrates beyond a reasonable doubt, for Rule 29 purposes, that various companies, such as Union Financial, Votaire, Danair, Aztec, and Stanara, were in existence and utilized by members of the enterprise, including Battle, Jr., Rydz and Manuel Marquez, Sr., before Battle, Jr., Rydz, and Marquez, Sr., ceased receiving gambling profits. The evidence sufficiently establishes that these companies were set up for the purpose of concealing the source of the illegal gambling proceeds received

from the New York gambling businesses. As discussed above, the evidence is sufficient that predicate acts of money laundering, in furtherance of the concealment goal, occurred after the effective date of the relevant statutes. By way of analogy to the circumstances in *United States v. Bolinger*, 796 F.2d 1394, 1407-08 (11th Cir.1986), it was the nature of the large scale illegal gambling operations that: "... means will be needed to conceal the source of considerable illegal proceeds. Laundering is thus integral to the type of distribution conspiracy involved in this case."

The point is that the Government has established that, at all relevant times, the ***1202** CORPORATION, as an ongoing organization, consisted of various associates, functioned as a continuing unit, and was devoted to making money through illegal gambling and protecting that money by any means necessary. Rydz, Marquez, Sr., and Battle, Jr., as associates of the organization, continued to further those goals while they were active in the CORPORATION, and, even after they ceased receiving profits from the CORPORATION, continued to further the goals of the enterprise by concealing the money and protecting it, and thereby protecting themselves, from detection from law enforcement agencies. To "hide and conceal," and to cause to "hide and conceal," the illegal proceeds of an enterprise can be a legitimate purpose of a RICO enterprise conspiracy, together with those acts committed in furtherance of the conspiracy. *United States v. Caporale*, 806 F.2d 1487, 1513 (11th Cir.1986). Similar to the circumstances in *Church*,

955 F.2d at 698, "... the enterprise was devoted to making money from repeated criminal activity, and protecting that money by any means necessary."

Battle, Jr. argues that the evidence, at best, merely demonstrates, at best, that he money laundered for himself, and he points out that he was not charged with substantive money laundering in the Superseding Indictment. He claims that the Superseding Indictment only charges him with money laundering for the CORPORATION while he was a member. However, his views of the enterprise conspiracy and his role as a co-conspirator are too narrow. Likewise, he construes the Superseding Indictment and his Bill of Particulars too narrowly. I find no variance.

An enterprise can have diverse objects and there is rarely a problem determining that the diverse acts of a criminal conspiracy, as opposed to the acts of a predominantly legitimate enterprise, satisfy the statutory requirements. *United States v. Church*, 955 F.2d 688 at 698 (citing *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir.)). It is not essential for the Government to prove that Battle, Jr. actually laundered money for the enterprise itself, and that those profits were returned to the enterprise for further distribution, before ***1203** money laundering can be a predicate act for a 1962(d) conspiracy. The goals and objectives of the enterprise may not necessarily be so limited.

Without doubt, Battle, Jr., Rydz, Marquez, Sr., and Battle, Sr. were among a core group of players in the enterprise, who shared several common purposes, and who participated in one overarching conspiracy. Here, the Superseding Indictment has alleged, and the Government has proven, that the enterprise, made up of these core participants and others, devoted itself to making money, protecting its ability to make money, and hiding the money so as to avoid detection by law enforcement. Avoiding detection was a major objective of the enterprise. The associates of the enterprise shared a common fear that detection by law enforcement could threaten the enterprise's ability to make money and could endanger its members if other members were caught and then cooperated with law enforcement in cases such as this one. The Government's evidence supports the significant extent to which enterprise members, including Battle, Sr., Battle, Jr., Rydz, and Marquez, endeavored to conceal their illegal gambling activities. They employed the same efforts to conceal the illegal proceeds distributed to them. They also used complicated money laundering schemes, involving third-party co-conspirators (including Mauerllo Marquez and Vidan), to hide their profits and thereby avoid detection by investing their illegal proceeds into purported legitimate businesses or off-shore accounts. Even when they were no longer active in the everyday affairs of the CORPORATION, it remained an ongoing organization with the same goals and objectives. The evidence supports that Battle, Jr., Rydz, Battle, Sr. and Marquez, Sr. continued to carry out an important goal and objective of the ongoing enterprise, namely

to avoid detection by money laundering, and, in this manner, to protect themselves (and other enterprise members, both past and present) from potential prosecution for crimes committed while they were active members.

Additionally, Jose Battle, Sr., Marquez, Sr. and other co-conspirators, as members and associates of the CORPORATION, carried out these same goals by the "...development, construction, renovation, ownership, management, operation and planed sale and wind-up of the CRILLION and its assets, including a casino and hotel complex in Lima, Peru, all as an instrument to promote their illegal activities, conceal their illegal proceeds [from illegal gambling], and avoid their reporting obligations as required by law." Superseding Indictment, pages 13-14.

F. *Commingling of Illegal Gambling "Personal Profits" In Legitimate Businesses*

[19] For Rule 29 purposes, the Government has established that, in an effort to disguise the true nature, ownership and source of the proceeds that the Defendants derived through racketeering activity, they engaged in the purchase of a casino in Peru (Battle, Sr., Marquez, Sr. and others) and purchased (Battle, Jr. and Rydz) what otherwise would have been legitimate assets in the United States through the use of foreign accounts and corporations. The next issue is whether money laundering can occur subsequent to the enactment of relevant statutes if illegal gambling monies were invested and then re-

invested along with legally earned monies in legitimate businesses. Based on the case law discussed below, the answer is that commingling illegal and legal monies taints all funds originating from the defendant, and that: "[t]he amount of illegal money that needs to be combined with another, larger amount of legal money need only be slight to render all the money commingled and, ***1204** therefore illegal. And, once the illegal and legal monies are commingled, no passage of time will remove the taint." *United States v. Abbell*, 271 F.3d at 1294-96. *See* also *United States v. Ward*, 197 F.3d 1076, 1083 (11th Cir.1999) ("The district court's theory that the passage of time and the large infusion of legal proceeds remove the taint from the illegal proceeds defeats the purpose of the money laundering statute and promotes money laundering schemes. Because money is fungible, the government must prove only that the tainted proceeds were commingled with other funds.").

In *United States v. Majors*, 196 F.3d 1206 (11th Cir.1999), the Eleventh Circuit determined the sufficiency of the evidence to support a money laundering conviction where: "[i]n an elaborate shell game, appellants moved ill-gotten funds in and out of various corporate bank accounts," which was "designed to make the funds ultimately enjoyed by appellants appear as legitimate income not derived from the company" though which they had engaged in illegal conduct. *Id.* at 1213. In upholding the conviction, the Eleventh Circuit stated, in a manner pertinent here, "Evidence that may be considered when determining whether a transaction was

designed to conceal includes ... structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction ...." *Id.* at 1213 n. 18 (citing *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475-76 (10th Cir.1994)).

For Rule 29 purposes, the Government has sufficiently established that the Defendants utilized off-shore corporations in the names of nominees, which enabled them to purchase assets in the United States in their own names, and sell and re-purchase assets, all in an effort to disguise their ownership of the proceeds and to legitimatize the profits which they had derived from other illegal gambling. As noted in *Majors*, the fact that Defendants commingled their illegally-derived proceeds with what was purportedly legitimate assets may be considered by the jury as further evidence that the transactions were designed to conceal the illegal source of funds and their ownership in the foreign entities. *Majors*, 196 F.3d at 1214.

[20] For purposes of proving a predicate act, the Government is not required to trace the origin of all funds used in each of the businesses to determine exactly which funds were used for what transaction. The Eleventh Circuit has so held in *United States v. Cancelliere*, 69 F.3d 1116, 1120 (11th Cir.1995). The Eleventh Circuit reasoned that the statute requires that a transaction "involve" the proceeds of an

activity which the participant knows is unlawful. *Id.* The Eleventh Circuit adopted the Seventh Circuit's reasoning that the word "involve" does not obligate the Government to trace the origin of all funds deposited into a bank account to determine exactly which funds were used for what transaction. *Id.* The Eleventh Circuit held that: "Section 1956(a)(1)(A)(1) allows for convictions where the funds involved in the transaction are derived from a commingled account of which only a part comes from 'specified unlawful activities.' " *Id.* at 1120. I will include such jury instructions consistent with this Eleventh Circuit case law.

G. *Statute of Limitations Issues*

[21][22][23] In *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir.1995), the Court set forth the well-settled law as to the duration of a defendant's participation in a RICO conspiracy, and the legal requirements for an affirmative defense of withdrawal***1205** from the conspiracy. The Court begins with the premise that participation in a conspiracy is presumed to continue until all activity relating to the conspiracy is ceased. *Id.* Accordingly, each defendant is presumed to be a participant for the duration of the conspiracy unless he can overcome the presumption by providing his withdrawal. *Id.* A conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished. *Id.* Thus, to establish the affirmative defense of a withdrawal from the conspiracy, the defendant has the substantial burden of proving: (1) that he has taken affirmative steps, inconsistent with

the objectives of the conspiracy, to disavow or to defeat the objectives of the conspiracy; and (2) that he made a reasonable effort to communicate those acts to his co-conspirators or that he disclosed the scheme to law enforcement authorities. *Id.* Thus, " 'A mere cessation of activity in the conspiracy is not sufficient to establish withdrawal.' " *Id.*

In *United States v. Harriston*, 329 F.3d 779, 783 (11th Cir.2003), the Eleventh Circuit expanded upon these principles by re-emphasizing that the Government satisfies the requirements of statute of limitations for a non-overt act conspiracy [i.e. RICO],[16] if it alleges and proves that the conspiracy continued into the limitations period. Although the RICO statute contains no time limit provision for criminal prosecutions of racketeering conspiracies, the Eleventh Circuit, in *Harriston*, applied the general five-year statute of limitations contained in Title 18, U.S.C. § 3282. *Id.* Thus:

> An accused conspirator's participation is presumed to have continued until all objects of the conspiracy have been accomplished or until the last overt act has been committed by any of the conspirators. However, if a conspirator establishes the affirmative defense of withdrawal, the

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[16] For instance, a conviction for conspiracy to commit money laundering does not require proof of an overt act in furtherance of the conspiracy. *Whitfield v. United States*, 543 U.S. 209, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005).

> statute of limitations will begin to run at the time of the withdrawal. Otherwise, the statute will not begin to run until the final act of the conspiracy has occurred. *United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir.2005) (internal citations omitted).

Here, insofar as the original indictment was returned on March 16, 2004, the Government must establish that the conspiracy continued until within five years of March 16, 2004. The Government argues, for Rule 29 purposes, that the enterprise's illegal gambling conspiracy continued, for continuity purposes, through 2003 based upon the wiretap evidence and the testimony of Luis Perez. The evidence also shows that the organization continued to refer to itself as the CORPORATION. The Government relies on this evidence to refute the claim that the CORPORATION terminated its existence at the time that Battle, Sr. and Marquez, Sr. stopped receiving profits from the New York gambling operations. The Government essentially argues that the Defendants never abandoned the enterprise's goal to conceal a considerable amount of the illegal proceeds through money laundering efforts. *United States v. Arnold*, 117 F.3d 1308, 1314 (11th Cir.1997) ("Because 'it is the nature of large scale drug dealings that means will be needed to conceal the source of considerable illegal proceeds,' we found laundering to be an integral part of the conspiracy.") (citing *United States v. Bolinger*, 796 F.2d at 1408 (11th Cir.1986)). It also furthers the goal of the enterprise of concealing the underlying illegal activity ***1206** that generated the ill-gotten gains. *United States v.*

Carter, 721 F.2d 1514, 1527 (11th Cir.1984), *vacated in part on other grounds*, *U.S. v. Lightsey*, 886 F.2d 304 (11th Cir.1989) (citing *United States v. Turkette*, 452 U.S. 576, 591, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). In this manner, the "senior" equity partners in the organization, once retired, can then shift more of their attention to legitimizing their ill-gotten gains without danger of "being caught." According to the Government, for these reasons, Rydz and Battle, Jr. used foreign shelf corporations and bank accounts to finance their investments in Union Financial and a host of other clothing companies; and Battle, Sr., Marquez, Sr., and Luis DeVilliers, who was also in the New York illegal gambling business, financed a legal casino in Peru.

Battle, Jr. argues that he and Rydz "dropped out" of the enterprise conspiracy in 1988 after Battle, Sr.'s brother's funeral, when they announced that they would no longer receive profits from the New York gambling enterprise. They took no other affirmative acts inconsistent with the conspiracy. They did not advocate that the conspiracy should cease or that others should leave. Nor did they cease their money laundering activities. Ultimately, their affirmative defense of "withdrawal," will be decided by the jury on the basis of all the evidence. *United States v. Jimenez*, 622 F.2d 753, (5th Cir.1980) ("Our conclusion that there existed a question of fact as to the meaning of Jimenez' actions, even under the United States Gypsum standard, applies also to the motion for acquittal at the end of all the evidence"); *United States v. Diaz*, 176 F.3d 52, 98 (2d. Cir.1999) (holding that the issue of whether a defendant's

incarceration establishes withdrawal from the conspiracy must be decided by the jury in light of all the evidence).

Because the facts relating to Defendants' affirmative defense of withdrawal and statute of limitations are inevitably bound up with the evidence pertaining to the conspiracy itself, those issues cannot be decided as a matter of law. Even if I was permitted to decide the issue at the Rule 29 stage as a matter of law, I would decline to do so based on the facts presented by the Government. A determination of when a conspiracy ends, or when a defendant withdraws, requires scrutiny of all of the pertinent facts in each case, including the scope of the conspiratorial agreement. In order to determine the objects, it is necessary to look to the conspiratorial agreement, the relevant contours of which are charged in the Superseding Indictment. *Pippin*, 903 F.2d at 1481. Battle, Jr. may not rely on the single act of retirement to establish withdrawal.[17] Because Battle, Jr. was involved in a continuing conspiracy, the mere

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[17] In *Heller v. Plave*, No. 89-0639-CIV-ATKINS, 1993 WL 557846, at *11-12 (S.D.Fla. Aug.2, 1993), the defendants had conspired to deprive the plaintiff of a defense to a criminal IRS investigation. One defendant claimed that he withdrew from the conspiracy by virtue of the fact of his retirement. The district court rejected the defendant's position, finding that the fact of retirement alone did not absolve the defendant because he was part of a continuing conspiracy that he set into motion and he did nothing to stop the objectives from being realized. Also, the defendant did not report his separation from the conspiracy to anyone, and he remained in contact with his co-conspirators.

act of retirement is not alone sufficient to defeat all of the objects of the conspiracy. *United States v. Nixon*, 918 F.2d, 895, 907 (11th Cir.1990) (non-participation insufficient to establish withdrawal where circumstances made it foreseeable that conspiracy would continue). Because the Government has shown that Battle, Jr. continued to further the enterprise's goals of money laundering its member's illegal profits, and did not withdraw from that ***1207** aspect of the enterprise conspiracy, his withdrawal amounted to "[a] mere cessation of activity in [one aspect] of the conspiracy [which] is not sufficient to establish withdrawal." *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir.1987); *LeQuire*, 943 F.2d at 1564 ("Ward continued to cover up for the enterprise even after his involvement in the smuggling operation itself had allegedly ceased. Thus, we must affirm the district court's decision that the case against Ward was not barred by the statute of limitations.").

[24] I conclude that the jury could well find that the money laundering acts of concealment were done in furtherance of one of the main criminal objectives of the conspiracy and continued as such during the five year period prior to the Indictment. Likewise, the jury could well find that, following his money laundering in Peru, Marquez, Sr. failed to make a reasonable effort to communicate his withdrawal to his co-conspirators and that he failed to disclose the CORPORATION'S criminal schemes to law enforcement. "The accused participant is not required to notify 'each other member' that he will no longer participate, but the acts of withdrawal must be

'communicated in a manner reasonably calculated to reach co-conspirators.' " *United States v. Arias*, 431 F.3d at 1341 (quoting *United States v. Gypsum Co.*, 438 U.S. 422, 464-65, 98 S.Ct. 2864, 2887, 57 L.Ed.2d 854 (1978)). Marquez may not merely rely on his physical distance from, rather than his repudiation of, the actions of his co-conspirators. *United States v. Dabbs*, 134 F.3d 1071, 1083 (11th Cir.1998).

H. *Predicate Acts Subject to Rule 29 Analysis; Exclusion of Certain Evidence or Limiting Instructions; James Ruling*

Before addressing the James analysis with respect to Fed.R.Evid. 801(d)(2)(E), it is first necessary to determine if any portion of that evidence should first be excluded for reasons unrelated to Rule 801(d)(2)(E). Preliminarily, I already have discussed above the admission of evidence concerning acts before and after the enactment of money laundering statutes. Even if evidence is not admissible to prove the defendant joined the conspiracy with the specific intent to personally participate in the commission of two predicate acts as charged in the Superseding Indictment and Bills of Particulars, the evidence still may be relevant for other RICO purposes, such as establishing proof of the "enterprise," or proof that the defendant "associated" with the enterprise. [18]

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[18] Regarding proof that a defendant, at the time he knowingly and willfully agreed to join the conspiracy, did so with the specific intent to personally participate in the commission of two "predicate offenses," the Government must still establish that the two predicate offenses were part of a "pattern of racketeering activity." Section 1961(5) provides that a "pattern

The evidence ***1208** may also be admissible as "inextricably intertwined" with the RICO conspiracy and therefore necessary to tell the jury the "full story." With these standards in mind, I nonetheless exclude the following evidence against the following defendants: (1) the Torres murder is admissible only against Defendant Acuna as an alleged predicate act, and is not admissible against Defendants Battle, Jr. and Defendant Marquez, Sr., for any purpose consistent with the Superseding Indictment and the applicable Bills of Particulars; (2) the Peru money laundering evidence (including Government's Exhibit

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of racketeering activity requires at least two acts of racketeering activity, one of which occurred after October 15, 1970 and the last of which occurred within ten years after the commission of a prior act of racketeering activity." The element of the offense which requires that the defendant participated in the enterprise "through a pattern of racketeering activity" has two components: (1) the defendant's predicate act which he specifically intended to personally participate in were related to the enterprise charged (the "relationship requirement"); and (2) the two predicate offenses formed a pattern ("the pattern requirement"). *Starrett*, 55 F.3d at 1542; *Church*, 955 F.2d at 693. The first element requires that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity. *Id.* *United States v. Carter*, 721 F.2d at 1527. The second requirement, the "pattern requirement," requires proof that the predicate acts are related to each other and have continuity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). Predicate acts are related to each other if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Id.*; *Starrett*, 55 F.3d at 1543. Accordingly, the Government may introduce evidence related to these requirements.

661) [tape recording] is admissible only against Defendant Marquez, Sr. as an alleged predicate act and is not admissible against Defendants Battle, Jr. and Defendant Acuna for any purpose consistent with the Superseding Indictment; (3) the offshore and Florida money laundering evidence is admissible against Defendants Battle, Jr. and Marquez Sr.'s and not against Defendant Acuna for any purpose; (4) the Omar Broche murder is stricken as a predicate act as Marquez Sr., Battle, Jr., and Acuna; (5) the "Palulo" murder is stricken as a predicate act against Battle, Jr. and Acuna; and (6) the predicate acts based on gambling activity may not be charged against Marquez and Battle, Jr. once they no longer received gambling profits.[19] The gambling activities of the CORPORATION that occurred after that date would be admissible for other purposes, however, such to prove the continuity of the enterprise. I reserve, however, on Marquez Sr.'s Rule 29 motion on the "Palulo" murder as a predicate act. I am striking all the Florida bolita gambling evidence against the three remaining Defendants because that evidence has not been established beyond a reasonable doubt, even as against Battle, Sr. I conclude that the Government has not established beyond a reasonable doubt that the monies used to finance the casino in Peru came from the Florida bolita gambling as compared to the New York bolita gambling. Based on the Government's stipulation, the evidence pertaining to the death of Fernandez is stricken as

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[19] Likewise, the alleged gambling activities against Marquez, Sr. cannot be charged until he entered the conspiracy.

against Acuna, Battle, Jr. and Marquèz, Sr. For reasons I have already explained, evidence relevant to the New York bolita gambling is admissible against Defendants Battle, Jr., Marquez, Sr. and Acuna, for purposes relating to the ongoing and continuous nature of the enterprise, even after the time that Battle, Jr. and Marquez, Sr. ceased receiving illegal bolita gambling profits.

On June 13, 2006, the Government has introduced pleadings setting forth the predicate acts which the United States submits have been sufficiently established as to Julio Acuna, Manuel Marquez, and Jose Miguel Battle, Jr. First, I dismiss and strike from the Bills of Particulars any predicate acts which are not now included on the Government's June 13, 2006 pleadings. Second, I further strike from the Government's June 13, 2006 pleadings those predicate acts marked as stricken on Attachment One to this Order. I find that the Government, under the applicable Rule 29 test, has failed to establish evidence beyond a reasonable doubt, with all inferences in its favor, to support that the named defendants agreed personally to commit the predicate act at issue. I further discuss below my reasons for these rulings. Third, I reserve on the Rule 29 ***1209** motions on certain predicated acts as indicated on Attachment One.

[25] With regard to Rule 801(d)(2)(E) and *James* criteria, I have required during the trial that each witness offering a Rule 801(d)(2)(E) statement

provide a proffered statement.[20] During the trial, I required that those statements be certified prior to the witness's testimony. I admitted portions of the testimony based on the additional proffer, and I prohibited other portions of the testimony (for reasons stated of record). I now conclude that the Government has established by a preponderance of the evidence that the applicable trial testimony and tape recordings met the requisite standards that an enterprise conspiracy existed for the purposes of conducting a bolita gambling operation in New York; that each declarant and defendant were members of the conspiracy; and that the statements and tapes were made during the course and in furtherance of the conspiracy. In making this determination, I have considered both the hearsay statements themselves and other independent documentary evidence which I have admitted of record.[21] Except as I stated of

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[20] I required a general proffer from the Government prior to trial. The issue was subject to substantial briefing and oral argument.

[21] The Rule 801(d)(2)(E) statements of record that I have admitted include those of Consuelo Alvarez, Abraham Rydz, Ramon Hechavarria Jorge Oscar Roque, Luis Perez and tape records associated with enterprise bolita gambling; Hans Bunte, Francisco Quandusand, Felix Fefer, Fredo Chau, Samy Fefer, Harold Marchena, Jasobo Van Der Linden, Mario Masaveu, Salvador Ramirez, Hubert Salazar, Angela Maria Carrodeguas-Gonzalez, Luis De Villiers, S.R., Sara Pinon, Orestes Vidan, Oracio Altuve, Pedro Perez (DeVilliers' partner in New York bolita gambling) and Willie Diaz. I also made specific finding of record with regard to Government Exhibits, 687(a), 687(b), 687(c), 687(d), 688, 688(a) for Rule 801(d)(2)(E) purposes against Defendant Marquez, Sr. I adopt these findings and conclusions here. *See* Trial Transcript, May 1, 2006.

record at trial, and I have clarified above, a co-conspirator's statement is admissible against members of the conspiracy who joined after the statement was made. *United States v. Tombrello*, 666 F.2d 485, 491 (11th Cir.1982). Battle, Jr. argues, however, that the admission of statements of co-conspirators are not admissible against him after he withdrew from the conspiracy. *United States v. Nerlinger*, 862 F.2d 967, 974-75 (2d Cir.1988). While this is a correct statement of law, I find, for purposes of Rule 801(d)(2)(E) purposes that, by the preponderance of the evidence previously discussed, that Battle, Jr. had not withdrawn from the conspiracy.

I. *Predicate Acts, Collection of Unlawful Debt and the Government's Bill of Particulars*

[26] The Supreme Court has made clear that the conspiracy offense of 18 U.S.C. § 1962(d) has lesser proof requirements than the substantive RICO offense under § 1962(c). "The RICO conspiracy statute, § 1962(d), has broadened conspiracy coverage by omitting the requirements of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts." *Salinas v. United States*, 522 U.S. 52, 64, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997). Rather, the Government can show an agreement to participate in a RICO conspiracy in one of two ways: (1) by providing evidence that the defendant agreed

to commit two predicate acts ["Prong One"}], or (2) by producing evidence that the defendant agreed to the overall objective of the conspiracy ["Prong Two"]. *United States v. Abbell*, 271 F.3d 1286, 1299 (11th Cir.2001); *Harriston*, 329 F.3d at 785 (11th Cir.2003). "If the government can prove an agreement on an ***1210** overall objective, it need not prove a defendant personally agreed to commit two predicate acts." Abbell, 271 F.3d at 1299. And regardless of how the Government proves the agreement to the overall objective, it does not necessarily have to show that the defendant explicitly agreed with his co-conspirators to commit the substantive RICO crimes as described in the indictment, or that the conspirator knew all the other coconspirators, or was aware of all of the details of the conspiracy. *United States v. To*, 144 F.3d 737, 744 (11th Cir.1998).

The court in *To* held that, "[t]o establish a RICO conspiracy, the government needed to prove that Tam Minh Le and Pham 'objectively manifested, through words or actions, an agreement to participate in ... the affairs of [an] enterprise through the commission of two or more predicate acts.' " *Id.* at 744 (citations omitted). The *To* decision further stated: " '[t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts.' " *Id.* (citation omitted).

The Government in this case could have proven the Defendants' agreement to participate in either of two ways. The Government could have shown an agreement on an overall objective. "An agreement on

an overall objective may be proved 'by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.' " *Id.* The Government could also have attempted to prove that each Defendant agreed personally to commit two predicate acts and therefore to participate in a "single objective" conspiracy. *Id.* The important point emphasized in To under the "single objective" test is that the Government needs to show the Defendants' "agreement to commit personally two predicate acts." *Id.* at 746. With regard to the single object conspiracy theory, the Government's obligation to prove that the Defendants committed the two predicate acts satisfies the "pattern of racketeering" element necessary for a conviction under § 1962(d). *Gonzalez*, 921 F.2d at 1540. *See* also *Church*, 955 F.2d at 695 (in the context of a "single objective" conspiracy, "[t]he existence of the conspiracy agreement can be inferred from 'the conduct of the alleged participants or from the circumstantial evidence of the scheme.' ") (citations omitted); *Carter*, 721 F.2d at 1530 ("In a case of this type, the trial court must instruct the jury that an essential element of a RICO conspiracy charge is an agreement to participate in the enterprise's affairs by personally committing, or agreeing to personally commit, two or more predicate acts.").

The original Bills of Particulars against Defendants Battle, Jr., Marquez, Sr. and Acuna, (as modified in Attachment One), charged that each agreed to personally participate in the commission of two (or

more) predicate acts, and that each had the specific intent to personally participate in the commission of two or more predicate offenses. Accordingly, the Government cannot prove the RICO conspiracy based on a pattern of racketeering activity unless it satisfies beyond a reasonable doubt that the Defendants each agreed to commit two predicate acts. It may not prove the conspiracy merely by providing evidence that the Defendants agreed to the overall objective of the conspiracy. The situation is different, however, with regard to the second theory of liability under the Superseding Indictment, namely, collection of unlawful debt. I now discuss this aspect of the Superseding Indictment.

By prior order dated March 3, 2006, I denied Battle, Jr.'s motion to strike as surplusage Paragraph 11 of the Superseding Indictment which alleges an alternative ***1211** theory of liability-that is, "acts of collecting, and aiding and abetting in the collection of, unlawful gambling debts incurred and contracted in gambling activity ...." I left undecided, however, the question of how the Government may prove liability.

Under § 1962(c), it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through .... collection of an unlawful debt." Pursuant to § 1961(6), as applicable here, unlawful debt means, "a debt incurred or contracted in gambling activity which was in

violation of the law of the United States, a State or political subdivision, and which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof." (emphasis added). Unlike "pattern of racketeering" RICO, the Government need only prove one act of collecting an unlawful debt to secure a conviction. *United States v. Pepe*, 747 F.2d 632, 661 (11th Cir.1984).

[27] In considering the matter, I first address whether the Government is barred from arguing that the "second prong" analysis for a RICO conspiracy to collect an unlawful debt because of the position taken under the "first prong analysis" in its Bills of Particulars relating to "pattern of racketeering and predicate acts." I conclude that it is not barred. I did not require the Government to further explicate its alternative liability theory in the required Bills of Particulars. This was because there was no need to do so. The Superseding Indictment charging "... [the collection of an unlawful debt] is sufficient for constitutional purposes if it articulates in statutory language the elements of the violation." *United States v. Martell*, 906 F.2d 555, 558 (11th Cir.1990)(citing *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1410 (11th Cir.1989), *cert. denied*, 494 U.S. 1032, 110 S.Ct. 1484, 108 L.Ed.2d 620 (1990)). Here, the Government sufficiently followed the statutory language in the Superseding Indictment. Its allegations falls under the "Racketeering Conspiracy" count and stated that it was the "Second Alternative Grounds (sic) of Liability." Its placement in the Superseding Indictment put the defendants on

notice that the Government would put on evidence regarding their collection of unlawful gambling debts at trial.

[28] The second question is whether the Government may rely on a "second prong" theory of liability with regard to the collection of an unlawful debt under Section 1962(c) and (d). Admittedly, there is a dearth of case law regarding RICO claims involving the collection of unlawful debt. *See United States v. Vastola*, 670 F.Supp. 1244 (D.N.J.1987)(citing *United States v. Pepe*, 747 F.2d 632, 673 (11th Cir.1984))("Prosecutions under the unlawful provisions are rare."). Nonetheless, the case law supports that there may be two Section 1962(c) counts in an indictment-one based on a "pattern of racketeering" and one based on an unlawful debt collection. *United States v. Pepe*, 747 F.2d at 659. Participating in the affairs of an enterprise through the collection of an unlawful debt is an alternative ground for imposing liability, and the Government is not required to prove a "pattern of racketeering" in such cases.

Given the Section 1962(c) statutory language referring to " ... [c]onduct or participate, directly or indirectly in the conduct of the affairs of the enterprise through a pattern of racketeering activity or the collection of unlawful debt," I conclude that the two prong analysis is appropriate. It is the "direct" or "indirect" reference with regard to conducting or participating through a pattern or racketeering activity that has lead to the two ***1212** prong analysis regarding "predicate" acts. Since the same language

applies to collection of an unlawful debt, it follows that a two prong analysis would apply in that context as well. Thus, a defendant can be held liable for conspiracy under RICO if he or she was directly involved or indirectly involved with the conspiracy, regardless of whether or not they are "generals" (i.e. giving the orders to others to make the collections) or "foot soldiers" (i.e. physically collecting the debts for the enterprise). *See generally, United States v. Vastola*, 899 F.2d 211 (3rd Cir.1990)(although the Court concluded there was insufficient evidence to show Vastola had actually participated in, or supervised, an actual debt collection, Vastola was properly convicted of RICO conspiracy because he was aware of one debt collection and encouraged co-conspirators to collect it); *United States v. Oreto*, 37 F.3d 739 (1st Cir.1994), *cert. denied*, 513 U.S. 1177, 115 S.Ct. 1161, 130 L.Ed.2d 1116 (1995)("A person may be found to conduct or to participate in the conduct of an enterprise even though he is a mere employee having no part in the management or control of the enterprise and no share in the profits.").

In sum, for Rule 29 purposes, the Government acknowledges that it must prove that, at the time Battle, Jr., Acuna and Marquez, Sr. joined the conspiracy, each did so with the specific intent to personally participate in the commission of two "predicate offenses." I now hold that the Government may prove that Battle, Jr., Acuna and Marquez, Sr. May have violated Section 1962(d) with regard to collection of unlawful debt either by agreeing to personally participate in the collection of an unlawful debt, or by showing that the defendant specifically

intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would conduct or participate in conducting the enterprise's affairs through collection of unlawful debt.

Applying these principles, I find, for Rule 29 purposes, the evidence sufficiently establishes that Battle, Jr. and Marquez, Sr. joined the conspiracy with the specific intent to personally participate in multiple acts of illegal gambling and the collection of an unlawful debt by "foot soldiers." They did so as bankers and owners of the gambling debts. The evidence also is sufficient that Acuna specifically joined the conspiracy to enforce the collection of unlawful debt.

In addition, the evidence is sufficient to establish that, during the pendency of the conspiracy, Battle, Jr., Marquez, Sr. and Acuna specifically agreed to personally participate in two or more predicate acts. The Government may proceed on these predicate acts even though they occurred after each defendant joined the conspiracy. The RICO statute is not so limited as to preclude liability for serious crimes merely because the specific intent to commit them occurred after the defendant joined the conspiracy.

Nevertheless, the evidence is insufficient to establish that Battle, Jr. specifically agreed to participate in the multiple acts of arson, the murders associated

with the arsons, or the murder of Omar Broche.[22] As to Marquez, Sr., it is not necessary that the Government show that he agreed to personally participate in the ***1213** commission of these additional predicate acts when he first joined the conspiracy. The evidence sufficiently established that Marquez Sr.'s role in the conspiracy significantly evolved after he first joined. As noted in *Starrett*, 55 F.3d at 1552, "[T]he focus of the RICO conspiracy statute is not on why the defendant associates with the enterprise, but on what he does or agrees to do, while associated with it." (emphasis added). It is sufficient if his agreement to participate in the commission of additional predicate acts occurred in close temporal proximity with his joining the conspiracy. "We conclude that predicate acts occurring in close temporal proximity may satisfy

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[22] The Government offers the Broche murder as a predicate act only against Defendant Marquez. As to remaining predicate acts involving Jose "Palulo" Enriquez, and the charged arsons and resulting murders, I conclude, after careful consideration of the Government's arguments at the June 15 Rule 29 hearing, that, even with all inferences in its favor, it has failed to establish that Battle, Jr. agreed to personally participate in these predicate acts. The Government argues that it has made a sufficient showing under the definition of "racketeering activity" under Section 1961(A), but I conclude otherwise. Even if the Government had argued a "Second Prong" theory of liability consistent with that definition, I would still conclude it has failed to sufficient prove its case against Battle, Jr. [for Rule 29 purposes] with regard to the arsons and murders. I reach the same conclusion with regard to Marquez, Sr.'s alleged participation in the homicide of Omar Broche. The evidence, with all inferences in favor of the Government, fails to establish his agreement to personally participate in the murder.

RICO's pattern requirement if 'the predicates themselves amount to, or ...otherwise constitute a threat of continuing racketeering activity.' " *Id.* at 746 (citations omitted).

Battle, Jr. also argues that I should strike from the revised Bills of Particulars the predicate acts based on substantive money laundering relating to Union Financial Research and Voltaire Trading. Battle, Jr. argues that the Government amended the original Bill of Particulars by referencing activities that occurred after the effective date of the substantive money laundering statute. The Government argues that it did not amend the Bills of Particulars because the original Bills of Particulars was based upon "approximate dates." At worst, the Government argues that the evidence after the effective date constitutes a "variance." I reserve on this matter since I still must determine if the change constitutes an amendment or a prejudicial variance under *United States v. Reed*, 887 F.2d 1398 (11th Cir.1989) and *United States v. Narog*, 372 F.3d 1243 (11th Cir.2004).

WHEREFORE, it is ORDERED that the Defendants' Rule 29 motions are ruled upon consistent with this Order. The Government shall conform the evidence for the jury consistent with this Order.

ATTACHMENT ONE

UNITED STATES' NOTICE RE: PREDICATE OFFENSES JOSE MIGUEL BATTLE, JR. AGREED TO PARTICIPATE IN

The United States of America, by and through the undersigned Assistant United States Attorneys, and pursuant to this Court's request, hereby gives notice of the following predicate offenses which the United States submits have been sufficiently established as to Jose Miguel Battle, Jr. and which should be submitted to the jury for consideration:[23]

***1214**

[23] All of the predicate offenses listed below are contained in the United States' Bills of Particulars filed in the instant case. The United States has removed those which it believes should not be submitted to the jury.

Predicate Objective	Nature	Statute(s)	Location(s)	Date(s)[2]
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1974-~~2004~~ 1988
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-~~2004~~ 1988
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-~~2004~~ 1988
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1974-~~2004~~ 1988
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-~~2004~~ 1988
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-~~2004~~ 1988
interstate and foreign transmission of wagering information	transmission of wagers by telephone or fax	18 USC §1961(1)(B) 18 USC §1084	FL, NY, NJ	1974-~~2004~~ 1988

interstate and foreign transportation of wagering paraphernalia	person-to-person delivery of gambling records via airplane or automobile travel	18 USC §1961(1)(B) 18 USC §1953	FL, NY, NJ	1974-~~2004~~ 1984
illegal gambling business	bolita/numbers/lottery, bookmaking, illegal gambling machines	18 USC §1961(1)(B) 18 USC §1955	FL, NY, NJ	1974-~~2004~~ 1984
interstate travel or transportation in aid of racketeering activity	transportation of illegal gambling [illegible] machine parts	18 USC §1961(1)(B) 18 USC §1952	NY, NJ	1980-~~2004~~
murder-for-hire	murder-for-hire of Jose "Pablo" Enriquez	18 USC §1961(1)(B) 18 USC §1958	NY, NJ	12/23/74-10/7/83
money laundering only (not conspiracy to launder money)	monetary transactions through Union Financial Research	18 USC §1961(1)(B) 18 USC §1956(a)	Miami, FL, Panama	1980-1985 (and through 1987)
interstate and foreign travel or transportation in aid of racketeering	transportation of cash via courier for Union Financial Research	18 USC §1961(1)(B) 18 USC §1952	Miami, FL Panama	1980-1985
money laundering only (not conspiracy to launder money)	monetary transactions through Voltaire Trading	18 USC §1961(1)(B) 18 USC §1956(a)	Miami, FL, Islas Canarias, Spain, Panama, Venezuela	1980-1986 (and through 1988)
interstate transportation of gambling paraphernalia	transportation of gambling records	18 USC §1961(1)(B) 18 USC §1953	JFK Airport NY	04/08/83

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acts and threats involving conspiracy to murder	conspiracy to murder Jose "Pardo" Enriquez	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	09/13/83
acts and threats involving murder	murder of Jose "Palu[illegible] Enriquez	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	10/7/83
acts and threats involving arson	arson at 2004 Amsterdam Ave.	18 USC §1961(1)(A) NY Penal Law §150.20	Manhattan, New York	12/12/83
money laundering and conspiracy to launder money	monetary transactions through Aztec Financial Enterprises	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)	British Virgin Islands, Miami, FL, Panama, Venezuela	1984-mid-1990's
acts and threats involving arson	arson at 1621 Westchester Avenue, Bronx	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	08/23/84
acts and threats involving murder	murder of Francis [illegible]	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving murder	murder of Trinidad Rodriguez	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving murder	murder of Blossom Taylor	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving arson	arson at 410 W. 56th Street	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	10/26/84

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acts and threats involving murder	murder of Jannin Toribio	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	10/26/84
acts and threats involving murder	murder of Laura Sirgo	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	10/26/84
acts and threats involving arson	arson at 715 Riverdale Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	12/15/84
acts and threats involving arson	arson at 215 Troy Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NY	12/27/84 12/29/84
acts and threats involving arson	arson at 800 Rockaway Avenue	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	01/85-06/85
acts and threats involving arson	arson in 291 Fourteen Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	Kings County, NY	03/25/85
acts and threats involving murder	murder of Carlos Rivera	18 USC §1961(1)(A) NY Penal Law §125	Kings County, NY	03/25/85
interstate and foreign travel or transportation in aid of racketeering	transportation of approximately $800,000 destined for Switzerland	18 USC §1961(1)(B) 18 USC §1952	NY, France	04/02/85
acts and threats involving arson	arson at 864 Myrtle Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	04/08/85
acts and threats involving arson	arson at 900 Nicolas Avenue	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	05/13/85

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money laundering and conspiracy to launder money	money laundering through YMR Fashions	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)	Miami, FL	1988-1992
money laundering and conspiracy to launder money	money laundering through Arnold Stores	18 USC §1961(1)(B) 18 USC §1956(a)	Miami, FL	1988- 1995
money laundering and conspiracy to launder money	monetary transactions through Stanara Company Corp.	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)		1988-2001
money laundering and conspiracy to launder money	money laundering through Trends Clothing Corporation	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)	Miami, FL Cayman Islands	1994-1995
money laundering and conspiracy to launder money	money laundering through Biscayne Coast Investments, Inc.	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)	Miami, FL	1995-2001

*1219 *UNITED STATES' NOTICE RE: PREDICATE OFFENSES MANUEL MARQUEZ AGREED TO PARTICIPATE IN*

The United States of America, by and through the undersigned Assistant United States Attorneys, and pursuant to this Court's request, hereby gives notice of the following predicate offenses which the United States submits have been sufficiently established as to Manuel Marquez and which should be submitted to the jury for consideration:[24]

*1220

[24] All of the predicate offenses listed below are contained in the United States' Bills of Particulars filed in the instant case. The United States has removed those which it believes should not be submitted to the jury.

Predicate Objective	Nature	Statute(s)	Location(s)	Date(s)
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	early 1970's-2004
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-2004
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-2004
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	late ~~early~~ 1970's-2004
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-2004
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-2004
interstate and foreign transmission of wagering information	transmission of wagers by *telephone or fax*	18 USC §1961(1)(B) 18 USC §1084	FL, NY, NJ	late ~~early~~ 1970's-2004
interstate and foreign transmission of wagering paraphernalia	person-to-person delivery of gambling records via airplane or automobile travel	18 USC §1961(1)(B) 18 USC §1953	FL, NY, NJ	late ~~early~~ 1970's-2004

illegal gambling business	bolita/numbers/lottery, bookmaking, illegal gambling machines	18 USC §1961(1)(B) 18 USC §1955	FL, NY, NJ	early 1970's-2004
interstate travel or transportation in aid of racketeering activity	transportation of illegal gambling machines and/or machine parts	18 USC §1961(1)(B) 18 USC §1952	NY, NJ	1980-2004
interstate and foreign travel or transportation in aid of racketeering	transportation of cash via courier for Union Financial Research	18 USC §1961(1)(B) 18 USC §1952	Miami, FL Panama	1980-1985
interstate transportation of gambling paraphernalia	transportation of gambling records	18 USC §1961(1)(B) 18 USC §1953	JFK Airport NY	04/08/83
acts and threats involving conspiracy to murder	conspiracy to murder Jose "Palulo" Enriquez	18 USC § 1961(1)(A) NY Penal Law §125	NYC, NY	09/13/83
acts and threats involving murder	murder of Jose "Palulo" Enriquez	18 USC § 1961(1)(A) NY Penal Law §125	NYC, NY	10/07/83
acts and threats involving arson	arson at 2004 Amsterdam Ave.	18 USC 1961(1)(A) NY Penal Law §150.20	Manhattan, New York	12/12/83
acts and threats involving arson	arson at 1621 Westchester Avenue, Bronx	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	08/23/84

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acts and threats involving murder	murder of Francis Marlene	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving murder	murder of Trinidad Rodriguez	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving murder	murder of Blossom Layton	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	08/23/84
acts and threats involving arson	arson at 410 W. 56th Street	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	10/26/84
acts and threats involving murder	murder of Jannin Toribio	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	10/26/84
acts and threats involving murder	murder of Laura Sirgo	18 USC §1961(1)(A) NY Penal Law §125	NYC, NY	10/26/84
acts and threats involving arson	arson at 715 Riverdale Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	12/15/84
acts and threats involving arson	arson at 215 Troy Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NY	12/27/84 12/29/84
acts and threats involving arson	arson at 580 Rockaway Avenue	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	01/85-06/85
acts and threats involving arson	arson at 291 Evergreen Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NY	03/25/85
acts and threats involving murder	murder of Carlos Rivera	18 USC §1961(1)(A) NY Penal Law §125	Kings, County, NY	03/25/85

acts and threats involving arson	arson at 960 Myrtle Avenue, Brooklyn	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	04/08/85
acts and threats involving arson	arson at 900 Nicolas Avenue	18 USC §1961(1)(A) NY Penal Law §150.20	NYC, NY	05/13/85
acts and threats involving murder	homicide of Omar Brochc	18 USC §1961(1)(A) NY Penal Law §125	NY, NY	06/27/92
interstate and foreign travel or transportation in aid of racketeering	transportation of cash and checks via courier from Miami, FL to Lima, Peru	18 USC §1961(1)(B) 18 USC §1952	Miami, FL Lima, Peru	12/92-present
money laundering and conspiracy to launder money	transportation of cash and checks via courier from Miami, FL to Lima, Peru and wire transfer of funds from Switzerland	18 USC §1961(1)(B) 18 USC §1956(a) 18 USC §1956(h)	Miami, FL, Lima, Peru, Switzerland	12/92-present

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*1224 *UNITED STATES' NOTICE RE: PREDICATE OFFENSES JULIO ACUNA AGREED TO PARTICIPATE IN*

The United States of America, by and through the undersigned Assistant United States Attorneys, and pursuant to this Court's request, hereby gives notice of the following predicate offenses which the United States submits have been sufficiently established as to Julio Acuna and which should be submitted to the jury for consideration:[25]

***1225**

[25] All of the predicate offenses listed below are contained in the United States' Bills of Particulars filed in the instant case. The United States has removed those which it believes should not be submitted to the jury.

Predicate Objective	Nature	Statute(s)	Location(s)	Date(s)
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NY Penal Law §225 NY Penal Law §20.00	NYC, NY	1974-2004
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-2004
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NY Penal Law §225	NYC, NY	1980-2004
acts and threats involving gambling	bolita/numbers/lottery	18 USC §1961(1)(A) NJ Stat. 2C:37 NJ Stat. 2C:2-6	NJ	1974-2004
acts and threats involving gambling	illegal gambling machines	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-2004
acts and threats involving gambling	bookmaking	18 USC §1961(1)(A) NJ Stat. 2C:37	NJ	1980-2004
interstate and foreign transmission of wagering information	transmission of wagers by telephone or fax	18 USC §1961(1)(B) 18 USC §1084 18 USC §2	FL, NY, NJ	1974-2004
illegal gambling business	bolita/numbers/lottery, bookmaking, illegal gambling machines	18 USC §1961(1)(B) 18 USC §1955 18 USC §2	FL, NY, NJ	1974-2004

*1226

murder-for-hire	murder for-hire of [redacted] "Palulo" [redacted]	18 USC §1961(1)(B) 18 USC §1958	NY, NJ	12/23/74- [redacted]83
murder-for-hire [redacted]	murder-for-hire of Ernesto Torres [redacted]	18 USC §1961(1)(B) [redacted] USC §1958	NY, FL	01/76
acts and threats involving conspiracy to murder	conspiracy to murder Ernesto Torres	18 USC 1961(1)(A) Fla. Stat. § 782.04 Fla. Stat. § 777.04(3)	NY, Opa Locka, FL	01/76- 06/16/76
interstate travel in aid of racketeering activity	murder of Ernesto Torres	18 USC §1961(1)(B) 18 USC §1952	NY, FL	06/76
acts and threats involving conspiracy to murder	conspiracy to murder Idalia Fernandez	18 USC 1961(1)(A) Fla. Stat. §782.04 Fla. Stat. §777.04(3)	Opa Locka, FL	06/16/76

S.D.Fla.,2006.
U.S. v. Battle
473 F.Supp.2d 1185, 20 Fla. L. Weekly Fed. D 395

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 10, 2009
THOMAS K. KAHN
CLERK

No. 07-10382-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIO ACUNA, a.k.a. Chino,
JOSE MIGUEL BATTLE, JR.,
a.k.a. Miguelito,
a.k.a. Jose R. Battle,
a.k.a. Jose Miguel Battle Rodriguez,
a.k.a. Jose Rodriguez Battle,
a.k.a. Jose Rodriguez Batlle,
a.k.a. Mike Battle,
a.k.a. Mike Jr.,

Defendants-Appellants.

. . . . . .

On Appeal from the United States District Court for the Southern District of Florida

. . . . . .

BEFORE: EDMONDSON, Chief Judge, ANDERSON, Circuit Judge and COHILL,* District Judge.

PER CURIAM:

The petitions for rehearing filed by the Appellants are DENIED.

ENTERED FOR THE COURT:

/s/JL Edmondson
CHIEF JUDGE